Nos. 83-141, 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Appeal No. 83-141 Docketed July 28, 1983;
Appeal No. 83-283 Docketed August 16, 1983.

Probable Jurisdiction Noted and Cases Consolidated October 31, 1983.

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Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

No. 79-0096

MIDKIFF, FRANK E., RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

—v.—

TOM, PAUL A., TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE IKI COMMUNITY AS-

SOCIATION; WAIAU COMMUNITY ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.; KAHALA COMMUNITY FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,

Intervenors.

DATE	*NR.*	*PROCEEDINGS*
1979		
Feb 28	1	VERIFIED COMPLAINT—EXHIBITS "A", "B" and "C" AND SUMMONS Summons issued
	2	Motion for Preliminary Injunction—Memorandum in Support of Motion for Preliminary Injunction—Affidavit of William Van Allen—Affidavit of Alfred J. Dow, Jr.—Notice of Motion—3-10-79 @ 10 am, Judge King
	3	Motion for Temporary Restraining Order—Memorandum in Support of Motion for Temporary Restraining Order—Affidavit of Matsuo Takabuki—Attorney's Certificate
	4	Temporary Restraining Order—defts restrained from taking any further action with respect to Pltfs' residential property purs. HRS Chapter 516 until M/PI heard—M/PI 3-10-79 @ 10 am, Judge King—Pltfs to post $100.00 security bond—TRO to expire 3-10-79 *KING*
		EO: M/TRO GRANTED—M/PI set for 3-10-79 @ 10 am—bond set @ $100.00 *KING*

DATE	NR.	PROCEEDINGS
Mar 2	5	Stipulation Extending Time—M/PI reset from 3-10-79 to 3-14-79 @ 9 am TRO reset from 3-10-79 to 3-14-79 *KING*
5	6	Return of Service—served Lawrence N. C. Ing 3-1-79
	7	Return of Service—served Tony Taniguchi 3-2-79
	8	Return of Service—served Franklin Y. K. Sun 3-1-79; Hawaii Housing Authority thru Asst. Dir. Wm. Hall 2-28-79; Paul A. Tom 3-2-79; Andrew I. T. Chang 3-1-79; Wayne T. Takahashi 3-1-79; Wilbert K. Eguchi 3-1-79; David C. Slipher 3-2-79
7	9	Motion to Intervene—Memorandum in Support of Motion to Intervene—Affidavit of John Francis Perkin—Exhibit "A"—Notice of Motion—Certificate of Service—3-14-79 @ 10 am, Judge King
8	10	Motion to Intervene as Defendants; Memorandum in Support of Motion to Intervene as Defendants; Exhibit 1; Affidavits of Franklin Y.K. Sunn and James H. Case; Exhibits A, B and C; Notice of Motion—3-14-79 @ 10 am, Judge King; Certificate of Service
9	11	Stipulation Extending Time; Order—M/PI from 3-14-79 to 4-24-79 @ 9 am *KING*
	12	Defendants' Memorandum in Support of Motion to Intervene; Affidavit of R. Brian Tsujimura
12	13	Defendants' Memorandum in Support of Motion to Intervenue; Affidavit of R. Brian Tsujimura; Affidavit of Maurice S. Kato

DATE	NR.	PROCEEDINGS
	14	Motion to Intervene as Defendants; Affidavit; Notice of Motion—3-14-79 @ 10 am, Judge King; Certificate of Service
13	15	Memorandum in Opposition to Motion to Intervene; Certificate of Service
14		*EP*: M/Intervene as Defts GRANTED—PT conf. set for 3-20-79 @ 2 pm (YI) *KING*
16	16	Return of Service—served Nobuyoshi Tamura—3-3-79
19		*EO*: PT conf. moved up to 3-20-79 @ 9:30 am *KING*
20		*EP*: PT—Motion by intervenors Kahala Community Assoc. to modify TRO GRANTED—M/Dissolve TRO set for 3-27-79 @ 11 am—Discussion re: Defts' proposed PT order (YI) *KING*
	17	Motion to Dissolve Temporary Restraining Order, or, in the Alternative for the Giving of Security; Memorandum in Support of Motion to Dissolve Temporary Restraining Order, Or, in the Alternative for the Giving of Security; Affidavit of Don R. Cowell; Notice of Motion—3-27-79 @ 11 am, Judge King; Certificate of Service
	18	Motion to Modify Temporary Restraining Order; Memorandum in Support of Motion to Modify Temporary Restraining Order; Exhibit A; Notice of Motion—3-20-79 @ 9:30
	19	Proposed Pre-Trial Order
	20	Answer to Complaint (HHA & Sunn)

DATE	*NR.*	*PROCEEDINGS*
	21	Plaintiffs' First Request for Production of Documents; Certificate of Service
22	22	Request for Production of Documents to Plaintiffs; Certificate of Service
	23	Request for Admissions; Certificate of Service
	24	Interrogatories to Plaintiffs; Certificate of Service
23	25	Answer of Intervening Defendants
	26	Defendant Intervenors' First Set of Interrogatories, Rule 34 Requests for Production, and Rule 36 Requests for Admissions to Plaintiffs; Certificate of Service
23	27	Order Granting Motions to Intervene
26	28	Interrogatories to Defendants
	29	Plaintiffs' Second Request for Production of Documents
	30	Memorandum in Opposition to Motion to Dissolve Temporary Restraining Order
	31	Supplementary Memorandum in Support of Motion to Dissolve Temporary Restraining Order
27	32	Order Modifying Temporary Restraining Order *KING*
	33	Proposed Pre-Trial Order
	34	Corrected Defendant Intervenors' First Set of Interrogatories, Rule 34 Requests for Production, and Rule 36 Requests for Admissions to Plaintiffs

DATE	NR.	PROCEEDINGS
	35	Answer to Complaint (Intervenors); Certificate of Service
		EP M/Dissolve TRO or for Bond DENIED (YI) *KING*
28	36	Defendant-Intervenor's Answer to Complaint; Certificate of Service
	37	Defendant-Intervenor's First Request for Production of Documents Propounded to Plaintiffs; Certificate of Service
Apr 2	38	Stipulation Re Application of 28 U.S.C. § 455; Certificate of Service
6	39	Motion to Take Judicial Notice; Exhibit "A"; Notice of Motion—4-24-79 @ 10 am, Judge King
	40	Notice of Taking Deposition
9	41	Notice of Taking Deposition
	42	Certificate of Service
10	43	Notice of Taking Depositions Upon Oral Examination
11	44	Return on service—served Agnes Conrad—4-10-79
	45	Notice of Taking Depositions Upon Oral Examination
	46	Notice of Taking Depositions Upon Oral Examination
	47	Notice of Taking Deposition
	48	Notice of Taking Deposition
	49	Return on serv—served William Cook—4-9-79

DATE	NR.	PROCEEDINGS
	50	Return on serv—served Ike Odachi—4-9-79
	51	Return on serv—served Harlin Young—4-9-79
	52	Return on serv—served James Halstrom—4-9-79
12	53	Notice of Taking Deposition Upon Oral Examination
	54	Notice of Taking Deposition Upon Oral Examination
	55	Notice of Taking Deposition Upon Oral Examination
	56	Amended Notice of Taking Deposition Upon Oral Examination
	57	Notice of Taking Deposition
	58	Notice of Taking Deposition
	59	Notice of Taking Deposition
	60	Notice of Taking Deposition
	61	Notice of Taking Deposition
	62	Return on Subpoena—served Wayne Minami
	63	Objection to Subpoena and Certificate of Service
	64	Objection and Certificate of Service
	65	Notice of Taking Deposition Upon Oral Examination; Certificate of Service
	66	Motion for Order to Compel Discovery; Memorandum in Support of Motion; Exhibits A and B; Affidavit of Clinton R. Ashford; Notice of Motion and Certificate of Service—4-13-79 @ 9 am, Magis Young

DATE	NR.	PROCEEDINGS
	67	Ex Parte Motion for Order Shortening Time; Exhibit A and Affidavit of Clinton R. Ashford
	68	Ex Parte Order Shortening Time *YOUNG*
13	69	Memorandum in Opposition to Motion to Compel; Exhibits "A" and "B"; Affidavit of R. Brian Tsujimura; Exhibit A & B; Certificate of Service
13		*EP*: M/Compel—taken under advisement (TC) *YOUNG*
16	70	Return on Subpoena—served Tan Tek Lum
	71	Return on Subpoena—served Gilbert Root
	72	Return on Subpoena—served Alfred J. Dow, Jr.
	73	Return on Subpoena—served George Loomis of Bishop Est.—4-12-79
	74	Return on Subpoena—served Alfred Dow of Bishop Est.
	75	Return on Subpoena—served Matsuo Takabuki of Bishop Est.
	76	Return on Subpoena—served Myron Thompson of Bishop Est.
	77	Return on Subpoena—served William Van Allen of Bishop Est.
17	78	Objection to Subpoena; Exhibit A; Certificate of Service
	79	Return on Subpoena—served Don R. Cowell—4-12-79
	80	Return on Subpoena—served Raymond Lesher—4-12-79

DATE	NR.	PROCEEDINGS
	81	Return on Subpoena—served John J. Hulten—4-12-79
	82	Notice of Taking Deposition
	83	Notice of Taking Deposition
	84	Answers to Request for Admissions of Defendant-Intervenors Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund; Certificate of Service
	85	Answers to Interogatories of Defendants-Lessees Wai-Kahala Tract "H" Association, Inc., et al.; Certificate of Service
	86	Answers to Interrogatories of Defendant-Intervenors Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund; Certificate of Service
18	87	Return on Subpoena—served Aileen Anderson—4-17-79
	88	Motion to Compel Discovery and Impose Sanctions; Affidavits of James H. Case, James W. Boyle and Sue Lin Chong; Memorandum of Points and Authorities in Support of Motion to Compel Discovery and Impose Sanctions; Notice of Motion; Exhibits A through N—4-19-79 @ 9:30 am, Magis Young
19	89	Notice of Taking Deposition
	90	Notice of Taking Deposition
	91	Return on Subpoena—served Richard Sasaki

DATE	NR.	PROCEEDINGS
	92	Return on Subpoena—served Walter Loo
	93	Memorandum in Support of Motion for Order Compelling Discovery; Exhibit "A"; Certificate of Service
	94	Motion to Compel Production of Documents; Affidavit of William E. Atwater; Memorandum of Points and Authorities in Support of Motion to Compel Production of Documents; Notice of Motion; Exhibits A Through D—4-23-79 @ 11:30 am, Judge King
	95	Answers to Interrogatories (of Hawaii Housing Authority)
	96	State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and Certificate of Service
	97	Order Denying Plaintiffs' Motion to Compel Discovery—cc: Ashford, Morry, Naito, O'Connor, Case, Watts *YOUNG*
20	98	Ex Parte Motion for Order Shortening Time; Exhibit "A"; Affidavit of William E. Atwater; Order Granting Ex Parte Motion to Shorten Time for Hearing on Motion to Compel Discovery and Impose Sanctions; Certificate of Service—4-23-79 @ 11:30 am, Judge Byrne *BYRNE*
		Joint Deposition of Don R. Cowell and William Dornbush w/ exhibits—4-17-79
		Deposition of John Hulten—4-18-79
		Deposition of Eileen Anderson—4-18-79
		Deposition of Raymond A. Lesher—4-18-79

DATE	NR.	PROCEEDINGS
		Deposition of Sidney William Cook—4-11-79
		Deposition of Walter W.L. Loo—4-18-79
	99	Appeal of Magistrate's Order Denying Plaintiffs' Motion to Compel Discovery
	100	Memorandum in Opposition to Motion to Compel; Affidavit of G. Richard Mowry; Affidavit of Richard Sasaki; Cert. of Serv.
	101	Memorandum in Opposition to Motion for Preliminary Injunction; Exhibits A-D
	102	Certificate of Service
	103	Response to Plaintiffs' First and Second Request for Production of Documents
	104	Motion in Limine; Memorandum of Points and Authorities and Notice of Motion—4-24-79 @ 10 am, Judge King
	105	Answers to Interrogatories
	106	Answers to Interrogatories
	107	Response of Defendant-Intervenors to Plaintiffs' Second Request for Production of Documents; Cert. of Serv.
23	108	Memorandum in Opposition to Motion for Preliminary Injunction; Certificate of Service
		Transcript of Proceedings—4-13-79—copy—(TC)
	109	Supplement to Motion to Compel Discovery

DATE	NR.	PROCEEDINGS
	110	Memorandum in Opposition to Motion in Limine Filed by Defendant-Intervenors Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund
		Deposition of Richard S. Sasaki
		Deposition of Alfred J. Dow
		Deposition of Gilbert W. Root
		Deposition of Tan Tek Lum
		Deposition of Myron B. Thompson
		Deposition of George Loomis
		Deposition of James E. Hallstrom, Jr.
		Deposition of William Van Allen
		Deposition of Matsuo Takabuki
	111	Corrected and Supplemental Answers to Interrogatories to Defendants From Plaintiffs Dated March 26, 1979; Certificate of Service
	112	Reply Memorandum in Support of Motion for Preliminary Injunction; Cert. of Serv.
	113	Plaintiffs' Reply Memorandum on the Doctrine of Abstention; Cert. of Serv.
		EP: M/Compel—discussion re the issues to be tried in the M/PI hrng.—case to be pretried on 4-24-79 @ 10 am,—Hrng. on M/PI to follow (YI) *KING*
24		*EP*: M/PI and PT—Pltfs' exh. P-1 thru P-28 & P-86 & P87 admitted—Defts' exh. D-207 & D-209 admitted—William G. Van Alan, Kazuo Kohatsu CST—hrng. cont'd to 4-25-79 @ 9:30 am (DO) *KING*

DATE	NR.	PROCEEDINGS
	114	Defendant/Intervenor Halawa Valley Estates Fee Conversion Corporation's Answers to Interrogatories; Cert. of Serv.
	115	The Determination by the Legislature That A Taking is For a Public Purpose is Entitled to Great Deference
	116	The Presumption of Validity and Plaintiff's Burden of Proof
25		Deposition of Fred E. Case
		EP: Cont'd M/PI—Pltfs' exh. P-88 admitted—Defts' exh. D-104,105 & 222 admitted—Fred E. Case and Charles Ackerson CST—hrng cont'd to 4-26-79 @ 9 am (DO) *KING*
	117	Stipulation of Documentary Evidence; Order *KING*
		Deposition of Charles B. Akerson
	118	Stipulation of Documentary Evidence *KING*
26		Partial Transcript of Proceedings—4-24-79—copy (DO)
		EP: M/PI—Pltf's exh. P-29, P-31, P-33, P-36, P-40 thru P-63, and P-65 thru P-84—Deft's exh. D-100, D-106, D-107, D-200 thru D-206, D-11, D-12, D-15, D-17 and D-18—Mr. Kohatsu recalled—Plft rested—Raymond Lesher CST—Deft Waialae-Kahala Tract H Assoc. Inc., et al. rested—John Hulton CST—Deft K.C.A. rested—Pltf rested—hrng cont'd to 4-27-79 @ 9:30 am (DO) *KING*
27		*EP*: M/PI—taken under advisement—arguments heard by all parties (DO) *KING*

DATE	NR.	PROCEEDINGS
	119	Supplemental Trial Memorandum
May 1	120	Retn. on service—served Yoshi Yanagawa—4-18-79
	121	Retn. on service—served Franklin Y.K. Sunn—4-18-79
	122	Retn. on service—served Kazuo Kohatsu—4-20-79
3		Deposition of Ike Odachi
		Deposition of Harlin S.K.Y. Young
8	123	Decision on Motion for Preliminary Injunction—GRANTED *KING*
		cc: Ashford, Morry, O'Connor, AG off., Case, Watts
16	124	First Stipulation to Extend Time for Agreement on Form of Preliminary Injunction; Order—5-21-79 *KING*
Jun 8	125	Preliminary Injunction—Deft HHA enjoined from effectuating order to pltfs to commence arbitration, ordering any mandatory arbitration, or confining the method to be used for determining "owner's basis to the tow methods set forth in Section 516-1(A) and (B), HRS—provided that pltfs first give security in the sum of $10,000 for the payment of such costs and damages as may be incurred or suffered by any party who is found wrongfully enjoined when final decision reached—Provision for negotiations under HRS 516,Part IIA and out HRS 516, Part IIA, specifically designation and commencement of condemnation proceedings are not enjoined under this Prel. Inj. *KING*

DATE	NR.	PROCEEDINGS
15	126	Order to Deposit Money in an Interest Bearing Account *KING*
22	127	Notice of Pretrial Conference—7-6-79 @ 3 pm, Judge King
Jul 6		Partial Transcript of Proceedings—4-24-79—copy (DO)
		EO: Preliminary Pre-trial—Court ordered that the following timetable be followed: All motions to be filed by 8-3-79—Memos in Opp. to Motions be filed by 9-4-79—Reply memos be filed by 9-10-79—Arguments on motions and pretrial set for 9-17-79 @ 3 pm—Trial set for 12-4-79 @ 9 am—Mr. Watts will prepare order memorializing PT *KING*
Aug 3	128	Memorandum on the Extent of Judicial Inquiry into Legislative Findings and Certificate of Service
	129	Motion for Order Declaring Certain Facts Re Taken as True or Admitted for Purposes of This Proceeding; Memorandum of Law; Notice of Motion—9-17-79 @ 3 pm, Judge King
	130	Memorandum Concerning Scope of Review of Legislative Findings Supporting Chapter 516
15	131	Withdrawal and Substitution of Counsel—Hoddick, Reinwald, O'Connor & Marreck w/draws & Stubenberg, Shigemura, Roney & Gniffke appear *KING*
22	132	Certificate of Service *EO*: Conf.—trial set for 4-29-80 @ 9:30 am—further conf. 9-4-79 @ 3 pm *KING*

DATE	*NR.*	*PROCEEDINGS*
24		Transcript of Proceedings—4-24-79—copy (DO)—Vol. I Transcript of Proceedings—4-24-79—copy (DO)—Vol. II
Sep 4		*EP*: PT—M/SJ re: legislative findings ordered filed by 9-18-79—response by 10-15-79—reply by 10-29-79—hrng on motion 11-14-79 @ 9 pm—hrng previously set for 9-17-79 contd to 11-14-79 @ 2 pm (TC) *KING*
12	133	Notice of Taking Depositions Upon Oral Examination
18	134	Motion for Partial Summary Judgment; Memorandum in Support of Motion for Partial Summary Judgment; Exhibit; Affidavit of I. Nelson Rose; Affidavit of John Hulten; Notice of Motion; Certificate of Service—11-14-79 @ 2 pm, Judge King
21	135	Retn on serv—served Mike McElroy
27	136	Motion for Partial Summary Judgment; Memorandum in Support of Motion for Partial Summary Judgment; Notice of Motion; Certificate of Service—11-14-79 @ 2 pm, Judge King
Oct 2	137	Joinder in Motion for Partial Summary Judgment
15	138	Memorandum in Opposition to Motion for Order Declaring Certain Facts to Be Taken as True
	139	Trustees' Memorandum Regarding the Court's Scope of Review of Legislative Findings

DATE	NR.	PROCEEDINGS
	140	Memorandum in Opposition to Motions for Summary Judgment; Affidavits of Matsuo Takabuki and Rosemary Fazio
19	141	Joinder in Intervenors' Motions for Partial Summary Judgment and Memoranda in Support of Motions
24	142	Joinder in Motions for Partial Summary Judgment
29	143	Memorandum of Portlock Community Association, et al. in Response to Trustees Memorandum Regarding Scope of Review of Legislative Findings—Certificate of Service
	144	Response of Portlock Community Association; Kokohead Community Lease-Fee Inc.; Hahaione Valley Community Association Inc. to Trustees—Memorandum in Opposition to Motions for Summary Judgment—Certificate of Service
	145	Supplemental Memorandum in Support of Defendant-Intervenors' Motion for Partial Summary Judgment; Certificate of Service
	146	State Defendants' Reply Memorandum to Plaintiffs' Memorandum Regarding Court's Scope of Review of Legislative Findings
	147	Reply Memorandum Re Motion for Order Declaring Certain Facts to be Taken as True
Nov 14		*EP*: M/SJ—Taken under advisement. (YI) *KING*
26	148	Motion to Compel Discovery and Impose Sanctions; Memorandum in Support of Motion; Exhibits "A" and "B"; Affidavit of Rosemary T. Fazio; Notice of Motion—12-5-79 @ 3, Magis. Young

DATE	*NR.*	*PROCEEDINGS*
		Partial Transcript of Proceedings—11-14-79—copy (YI)
Dec 5		Deposition of Michael M. McElroy
10	149	Stipulation to Continue Plaintiffs' Motion to Compel Discovery and Impose Sanctions—from 12-5-79 to 12-17-79 @ 9 am, Magis. Young *KING*
13	150	Memorandum Decision—Defts entitled to summary judgmnet—It is not up to the Court to decide whether that Chapter 516 is legal but up to the Legislature that enacted it—cc: Ashford, Morry, Nakashima, Stubenberg, Tsujimura, Case, Watts (Defts. to prepare order) *KING*
18	151	Amended Notice of Motion
19	152	Amended Memorandum Decision—cc: Ashton, Morry, Nakashima, Stubenberg, Tsujimura, Case, Watts *KING*
1980		
Jan 4	153	Memorandum in Opposition to Motion to Compel Discovery
17		Transcript of Proceedings—9-4-79—orig. (TC)
22		Transcript of Proceedings—11-14-79—orig. (YI)
		Transcript of Proceedings—4-23-79—orig. (YI)
		Transcript of Proceedings—3-27-79—orig. (YI)
		Transcript of Proceedings—3-20-79—orig. (YI)

DATE	NR.	PROCEEDINGS
		Transcript of Proceedings—3-14-79—orig. (YI)
Feb 11		*EO*: Conference—discussion re clarification of Court's Order *KING*
19	154	Motion for Partial Summary Judgment, Dismissal of Claims and Entry of Final Judgment; Memorandum in Support of Motion; Notice of Motion—3-27-80 @ 9 am Judge King
25	155	Amended Notice of Motion—M/PSJ; Dismissal of Claims & Entry of Final Judgment—April 3, 1980 @ 9:00 am, Judge King
Mar 11	156	Joinder in Motion for Partial Summary Judgment
27	157	Joinder in Motion for Partial Summary Judgment—State defts.
28	158	Memorandum in Opposition to Motion for Partial Summary Judgment
31	159	Joinder in Motion for Partial Summary Judgment
Apr 1	160	Supplemental Memorandum in Support of Motion for Partial Summary Judgment
3		*EP*: M/PSJ GRANTED with exception (TC) *KING*
9		Transcript of Proceedings—4-3-80 (TC)—Copy
May 7	161	Stipulation for Withdrawal as Interventor by Alii Shores Community Association *KING*

DATE	NR.	PROCEEDINGS
Jun 10	162	FINAL JUDGMENT and PERMANENT INJUNCTION—Mandatory arbitration of HRS Chapter 516, Part IIA and HRS § 516-1(14) are unconstitutional—HHA personnel permanently restrained and enjoined from effectuating statutes in regard to any development tract of leasehold residential lots; effecting compensation to be paid as set forth in statutes—$10,100 posted for TRO to be returned to pltfs—HRS § 516-24, § 516-26 and §§ 516-61 through 516-70 are not ripe for review, and therefore are DISMISSED w/o prej.—Pltfs' claims premised on Article 3 of Hawn. Admiss. Act are nonjusticiable and accordingly DISMISSED w/prej.—Pending motions' issues not ripe for adjudication—All other issues raised by the Complaint and not disposed of by this jdgmt is GRANTED in favor of defts and deft-intervenors, and against pltfs—all parties shall bear own costs (copy given to financial deputy) *KING*
		cc: Ashford, Morry, Stubenberg, Tsujimura, Case, Watts
Jul 3	163	Stipulation for Partial Withdrawal as Intervenor by Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund *KING*
9	164	Stipulation for Withdrawal As Intervenor By Wai-Kahala Tract "H" Association, Inc. *KING*
	165	Notice of Appeal—(By Plaintiffs) Notice mailed to Stubenberg/Lawhn, Tsujimura/Kawada, Case/Bays, Watts & Clerk, 9th CCA; Docket Fee Pymt. Notif. Form & Docket Entries mailed to Clerk, 9th CCA; Notice also mailed to O'Connor & Naito

DATE	*NR.*	*PROCEEDINGS*
21	166	Designation of Reporters' Transcripts Certificate of Record mailed to Clerk, 9th CCA; Certificate of Record, Copy of Docket Entries and Designation of Clerk's Record form mailed to Stubenberg/Lawhn, Tsujimura/Kawada, Case/Bays & Watts. Also mailed to O'Connor & Naito.
30	167	Cross-Designation of Reporter's Transcript—Appellee Halawa Valley Estates Fee Conversion Corp.
31	168	Cross-Designation of Trial Clerk's Record—State Defendants
Aug 4	169	Cross-Designation of Trial Clerk's Record—Kahala Community Association, Inc. & Kahala Community Association Fee Purchase Fund
7	170	Cross-Designation of Reporter's Transcript—Portlock Community Assoc. (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Assoc.; Hahaione Valley Community Assoc., Inc.
Oct 21	171	Designation of Clerk's Record on Appeal—Appellant
1981		
Feb 23	172	Designation of Clerk's Record on Appeal—Appellee (Kahala Community Association, Inc. & Kahala Community Fee Purchase Fund)
	173	Defendants' Designation of Clerk's Record on Appeal (State)
27	174	Plaintiffs' Counter-Designation of Clerk's Record on Appeal

DATE	*NR.*	*PROCEEDINGS*
Mar 18		Record on Appeal Airmailed to Clerk, 9th CCA
Apr 13	175	Stipulation for Partial Withdrawal as Intervenor by Kahala Community Association, Inc., and Kahala Community Association Fee Purchase Fund *KING*
1983		
Jun 24	176	Amended Final Judgment and Permanent Injunction (PROPOSED)
	177	Statement of Objections to Plaintiff's Proposed Amended Final Judgment and Permanent Injunction
30	178	JUDGMENT—9th CCA—judgement of DC is hereby Reversed and Remanded—cc: Ashford; Morry; Stubenberg; Lilly, DAG; Case; Watts; David before *ALARCON, POOLE and FERGUSON*
Jul 1		*EO*: Status Conference set for 7-6-83 @ 9:30 am—Notified: Clinton Ashford, Esq. G. Richard Morry, Esq., Dennis E.W. O'Connor, Esq., Corey Park; Michael Lilly; Thomas Watts, A. Bernard Bays
6	179	Withdrawal and Substitution of Counsel; ORDER—Stubenberg w/draws & Alson appears for Intervenors-Appellees Portlock Comm. Assn. (Maunalua Beach); Kokohead Lease-Fee, Inc.; West Marina Comm. Assn.; Hahaione Valley Comm. Assn. *YOUNG*
		EO: discussion re: the order from the 9th CCA—pltf's M/Injunctive Relief set for 7-9-83 @ 10 am *KING*

DATE	NR.	PROCEEDINGS
14	180	Hawaii's Statement of Objections to Plaintiffs' Proposed Amended Final Judgment and Permanent Injunction; Appendix A—referred to Judge King
	181	MOTION for Temporary Restraining Order—Affidavit of Clinton R. Ashford—Attorney's Certificate
	182	Memorandum Regarding Form of Amended Judgment Upon Remand; Exhibits "A", "B", "C" ad "D"—referred to Judge King
15		*EP*: Govt's Motion for the Admission of Lawrence Tribe GRANTED—Pltf's Motion for Permanent Injunction—DENIED—Court Will Issue Order on Declaratory Judgment (YI) *KING*
	183	Intervenors-Defendants' Memorandum In Opposition to Permanent Injunction
18		Partial Transcript of Proceedings (YI) 7-15-83
25		*EO*: conference re: form of the order set for 7-28-83 @ 10 am—all parties notified by phone *KING*
28		Transcript of Proceedings—7-15-83 (YI) Original
	184	Amended FINAL JUDGMENT & Permanent Injunction-See Document for Details *KING*
29	185	ORDER Denying Request for Permanent Injunction *KING*
Aug 15	186	Order—from 9th CCA—appellants' emergency M/Recall the Mandate Granted

DATE	NR.	PROCEEDINGS
26	187	NOTICE OF APPEAL (By Plaintiffs); Copy of NA mailed to Clerk, 9th CCA, Lilly, Watts, Park, Bays & O'Connor
Sep 6	188	Transcript Designation and Order—7-15-83 (YI)—Already on file
	189	Notice of Intended Designation of Reporter's Transcript and Statement of the Issues
13	190	Notice of Cross-Designation of Reporter's Transcript—Do not intend to designate any further portions—(Park/Alston)
20	191	Notice of Change of Address—Thomas T. Watts
21	192	Designation of Reporter's Transcript—By Plaintiffs—7-15-83—Already on file
		Certificate of Record mailed to Clerk, 9th CCA; Copy of CR, docket sheet & Designation of Clerk's Record on Appeal form mailed to Ashford/Fazio, Morry/Sato, Lilly, Tribe, Watts, Alston, Case/Bays/Waters & O'Connor/Uyeno

Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs/Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendants/Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Defendants/Appellees.

DATE	*FILINGS-PROCEEDINGS*
1980	
July 14	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. ec
Jul 25	Filed CERTIFICATE OF RECORD (1/26/80). ss
Jul 25	Aplt (Midkiff) opening brief due 9/3/80. ss
Aug 12	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Oct 20 1980 kf

DATE	*FILINGS-PROCEEDINGS*
Oct 20	Filed orig & 15 aplts' opening briefs & 5 Excerpts. (10/20) ogm
Oct 20	Filed 10 aplts' appendices (Statutes, Rules, Regulations, etc.,)(10/20). ogm
Nov 14	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: Jan 21 1981 sh
Nov 21	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: *TOM* Jan 21 1980 kf
Nov 24	Fld mtn & ord (dep clk) granting Int/aples KAHALA COMM ASSOC & KAHALA COMM FEE PURCH FUND'S an ext of time to file brief to Jan 21, 1981. kf
Nov 24	Fld mtn & ord (dep clk) granting Int/aple WAI-KAHALA TRACT H an ext of time to file brief to Jan 21, 1981. kf
Nov 25	Fld mtn & ord (dep.clK) granting Int/aple HALAWA VALLEY ESTATES an ext of time to file brief to Jan 21, 1981. kf
1981	
Jan 13	Fl mtn & ord (CLK) gtng Aple (PAUL A. TOM, et al.,) ext of time to fl their Answering brief to: 2-20-81. bbm
Jan. 16	Fld mtn & ord (CLK) gtng Intervenors-Aples (WAI-KAHALA TRACT "H" ASSOC., et al.,) ext of time to fl. their brief to: 2-20-81. bbm
Jan 20	R'cvd as of 1/19, orig & 15 intervenor/aples' briefs (PORTLOCK COMMUNITY ASSOCIATION, KOKOHEAD COMMUNITY, etc.,); no proof of service; no Rule 13(e & j); notified counsel by letter. ogm

DATE	*FILINGS-PROCEEDINGS*
Jan. 27	Fld mtn & ord (CLK) gtng Interven.-Aples (KAHALA COMMUNITY ASSOC. & KAHALA COMMUNITY FEE PUR. FUND) ext of time to fl brief to 2-20-81. bbm
Jan 29	Filed as of 1/19, orig & 15 intervenor/aples' briefs (PORTLOCK COMMUNITY ASSO., et al., (1/19/81); deficiencies corrected. ogm
Feb. 9	Fld mtn & ord (CLK) gtng Aplts (FRANK E. MIDKIFF & et al.,) an ext of time to file Reply brief to: 3-9-81. bbm
Feb 23	Filed orig & 15 Int/Aple (WAI-KAHALA TRACT "H" ASS'N) ans brief (2/20). pf
Feb 23	Filed orig & 15 Int/Aple (KAHALA COMMUNITY ASS'N) ans brief (2/20). pf
Feb 24	Filed orig & 15 Aple's (TOM ET AL.) ans brief (2/20). pf
March 9	Filed aplts' motion for first and second exts of time in which to file reply brief with affidavit of Clinton R. Ashford in support of. (CIVATT) 3/5 rmc
March 12	Filed order (MO ATTY) aplts are granted an ext of time to and including April 23, 1981 in which to file their reply briefs. This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order. rmc
Mar 26	FILED as of 7/25/80 CERT RECORD ON APPEAL IN FOURTEEN VOLS, PLDGS, VOL I-IV copy R/T VOL V-XIV orig pv
Apr 24	Filed as of 4/23, orig & 15 aplts' reply briefs. (4/23) ogm

DATE	*FILINGS-PROCEEDINGS*
Oct. 13	Filed motion of intervenor-appellees (Kahala Community Association, Inc. & Kahala Community Purchase Fund) for add'l time for oral argument to (panel). jr 10/9/81
Oct 13	Rec'd aplts' letter of add'l authority to (panel). jr
Oct 16	Filed order (Poole) pursuant to the motion for add'l time for oral argument filed on 10/13/81, by intervenor aples, Kahala Community Association, Inc. and Kahala Community Purchase Fund, an add'l 10 minutes oral argument will be allocated to each side. jr
Oct. 21	ARGUED BEFORE: ALARCON, POOLE & FERGUSON; CJJ. Ordered from the bench: aplt's counsel will submit a letter brief 7 days from today. Apels' counsel will submit a response 7 days after receipt of aplt's letter brief. Submission deferred until Tuesday, November 3, 1981.
Oct. 30	Rec'd aplt's letter brief requested by court during oral argument to (panel). jr 10/28/81
Oct. 30	Rec'd aples' letter brief requested by court during oral argument to (panel). jr 10/28/81
Oct 30	Rec'd, as of 10/19/81, intervening aple's (Portlock) letter of 10/14/81 re: errors in the Table of Authorities to (panel). jr
Nov. 3	Rec'd, as of 10/20/81, intervenor's (Kahala Community, et al) letter of add'l authorities to (panel). jr
Nov. 3	Recvd as of Oct. 30 aples' letter brief requested by ct during oral argument. (Panel) 10/28. ag
Nov. 3	Recvd as of Oct. 30 intervenor-aples' (WAI-KAHALA TRACT "H" ASSOC., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag

DATE	*FILINGS-PROCEEDINGS*
Nov. 3	Recvd as of Nov. 2 intervenor-aples' (KAHALA COMMUNITY ASSOC., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag
Nov. 3	CAUSE SUBMITTED FOR DECISION PURSUANT TO MINUTE ORDER OF 10/21/81. jr
Nov. 9	Recvd letter dated Nov. 4 from Rosemary T. Fazio, counsel for aplts, re: reply to aples' letter briefs previously recvd. (Panel) 11/4. ag
Dec. 10	Recvd letter dated Dec. 7 from Dennis O'Connor, counsel for Intervenor-Aple's (Wai-Kahala Tract "H" Assn), re: additional citations. (Panel) 12/9. ag
Dec. 17	Recvd letter dated Dec. 15 from Clinton R. Ashford, counsel for aplts, re: response to Intervenor-Aple's add'l citations. (Panel) 12/15. ag
1982	
March 29	Recvd intervenor-aples' (WAI-KAHALA TRACT "H" ASSOC., et al.) supplemental letter brief per ct's request at oral argument. (Panel) 3/25. ag
1983	
Mar 28	ORDERED OPINION (ALARCON) POOLE CONCURRING & FERGUSON DISSENTING FILED & JUDG TO BE FILED & ENTD.
Mar 28	Filed Opinion-REVERSED & REMANDED.
Mar 28	Filed & Entered Judgment. sz
Mar 31	Filed Aplt's Emergency Motion for Preliminary Injunction Pending Issuance of Mandate. 3/30 PANEL EM

DATE	*FILINGS-PROCEEDINGS*
Apr 1	Filed Aple's Memorandum in Opposition to Emergency Motion for Preliminary Injunction pending appeal; Affidavit of James Case, Dennis O'Connor, and A. Bernard Bays. 3/31 PANEL EM
Apr 1	Filed Aplt's Supplemental Memorandum in support of Emergency Motion for preliminary injunction. 3/31 PANEL EM
Apr 5	Filed Intervenor-Appellees Motion in opposition to emergency motion for preliminary injunction pending issuance of mandate; and Withdrawal and Appearance of Counsel. 4/4 PANEL EM
Apr 5	Filed Deft-Aple's (Hawaii) Opposition to Aplt's Emergency Motion for Preliminary injunction pending issuance of mandate. 4/4 PANEL EM
Apr 5	Filed Order (ALARCON, POOLE and FERGUSON, CJJ) Pending a ruling on aplts' emergency motion for injunctive relief, appellees Hawaii Housing Authority, its agents and representatives, and all those acting in concert with it are restrained from further prosecuting *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408, in the First Circuit Court of the State of Hawaii. At oral argument to be held by a telephone conference call, appellees shall show cause why aplts' motion should not be granted and appellees be required to take all steps necessary to terminate the state proceedings. The parties will be notified subsequently of the time and date of oral argument. Judge Ferguson dissenting. (Case file) ogm
Apr 6	Filed Intervenors/Appellees' (KAHALA COMMUNITY ASSOC., et al.,) motion for oral argument and suggestion for hearing en banc on pltfs/aplts emergency motion for preliminary injunction pending issuance of mandate; memorandum in support thereof. 4/5 (Panel) ogm

DATE	FILINGS-PROCEEDINGS
Apr 6	Filed Intervenors'/Appellees' (WAI-KAHALA TRACT "H" ASSOC., et al.,) motion for personal appearance and oral argument and suggestion for hearing en banc and aplt's emergency motion to enjoin parties to Hawaii State Court Proceedings. (Panel) 4/5 ogm
Apr 6	Filed Affidavit of Dennis E. W. O'Connor in opposition to emergency motion for preliminary injunction pending issuance of mandate. (Panel) 4/5 ogm
Apr 6	Filed deft/appellees' (Hawaii, et al.,) motion for personal appearance at oral argument and suggestion for hearing en banc on aplts' emergency motion to enjoin ongoing Hawaii State Court Proceedings; Affidavit of George R. Ariyoshi. (Panel) 4/5 ogm
Apr 6	Filed Orig & 33 Intervenors'/Appellees' (WAI KAHALA TRACT "H" ASSOC., ET AL.,) Petition for Rehearing and Suggestion for Hearing En Banc. (Panel, active judges) 4/5 ogm
Apr 6	Filed Order (ALARCON, POOLE & FERGUSON) Aples' request to hold the hearing directed by the court's April 5, 1983 order in person rather than by a telephone conference call is granted. Argument will be held in S.F. on Apr 14, 1983 at 1:30 p.m. pacific time. No later than Apr 12, 1983, the parties may file supplemental materials addressing the issues raised by aplts' emergency motion for injunctive relief. In addition to filing these materials with the clerk in S.F., copies may be sent directly to the chambers of the members of the panel. js

DATE	*FILINGS-PROCEEDINGS*
Apr 8	Filed Orig & ee Intervenors-Appellees [Kahala Comm. Assoc., Inc., et al] Petition For Rehearing and Suggestion of Rehearing En Banc. 4/7 (Panel & Active Judges) ot
Apr 11	Filed Intervenor-Aple's Memorandum in opposition to aplts Emergency Motion for Preliminary Injunction Pending Issuance of Mandate; 4/11 PANEL EM
Apr 11	Filed State of Hawaii's Appendix and Exhibits in Opposition to Aplt's Emergency Motion for preliminary injunction. 4/11 PANEL EM
Apr 11	Filed Aples' [Hawaii] Petition for Reconsideration And Suggestion For Rehearing En Banc. 4/8 (Panel & Active Judges) -ot-
Apr 11	Filed Intervenors-Aples [Portlock Community Assoc., Kokohead Community Lease-Fee, Inc.; West Marina Community Assoc.; and Hahaione Vly Community Assoc] Petition For Rehearing Suggestion of Appropriateness of Rehearing En Banc. 4/10 (Panel & Active Judges) -ot-
Apr 12	Filed Pltfs'/Aplts' Reply Memorandum in support of the emergency motion; Affidavit and Exhs. A thru F, attached thereof. (Panel) 4/12 ogm
Apr 12	Filed Intervenor/Aples' Supplemental memorandum in opposition to emergency motion for prel. injunction pending issuance of mandate. (Panel) 4/11 ogm
Apr 12	Filed Hawaii's Supplemental Memorandum in opposition to aplts' emergency motion for prel. injunction pending issuance of mandate. (Panel) 4/11 ogm

DATE	*FILINGS-PROCEEDINGS*
April 13	Filed amicus curiae, Acting Chief Justice (Herman T. F. Lum) and Acting Administrative Head of the judiciary of the State of Hawaii, memorandum in opposing the issuance of federal injunctive relief against state court proceedings in the instant case. gb (4/12) (PANEL) w/cover letter
Apr 14	Filed aplt's Motion to strike Appendix "A" to deft-aples' Memorandum in opposition to Pltf-aplt's Emergency Motion. 4/13 PANEL em
Apr 14	Filed ORDER (Alarcon and Poole) vacating filing of forty exhibits attached to affidavit of Michael A. Lilly. Docements may be lodged with the court subject to later determination as to whether any of the items should become part of the record. c2
Apr 14	Filed Aplt's Bill of Cost. 4/11 -ot-
Apr 14	Argument on aplt's emergency motion for injunctive relief before: Alarcon, Poole and Ferguson. c2
Apr 14	Filed Order (ALARCON, FERGUSON and POOLE, CJJ) The motion for an injunction directing the parties to stay further prosecution of the matter entitled Hawaii Housing Authority, Plaintiff, v. Frank E. Midkiff, et al., Defts, now pending in the Circuit Court of the First Circuit, State of Hawaii, at Civil No. 63408 thereof, is denied. The order to show cause is vacated and the stay heretofore entered is dissolved. All parties to bear their own costs of this appeal. ogm
Apr 15	Filed Order (CHIEF DEP CLK) The motion of Herman T.F. Lum, Acting Administrative Head of the Judiciary of the State of Hawaii, to file an amicus curiae memorandum is granted. The motion of aples' for a hearing en banc on aplt's

DATE	FILINGS-PROCEEDINGS
	emergency motion for an injunction is denied. The final word of the order filed Apr 14, 1983 denying the injunction is changed from "appeal" to proceeding." js
Apr 21	Filed Intervenor's-Aple's objection to the Bill of Cost. 4/20 -ot-
Apr 27	Filed intervenor's-aple's, (Kamiloiki Community Assos.), Motion for order lodging exhibits one through forty attached to the affidavit of Michael A. Lilly as an appendix; Affidavit of Theodore Y. Uyeno; exhibit "A". 4/25 PANEL SZ
Apr 27	Recv'd from the office of the Atty. Gen. of Hawaii, Appearnace of counsel Laurence H. Tribe as counsel of record for the defendant/appellees Paul A. Tom, T. Tanigughi, et al. sz
Apr 28	Filed Aplts' Memorandum In Support of Plaintiffs-Aplts Bill of Cost. 4/26
Apr 28	Filed Hawaii's Objection To Bill of Costs. 4/26
May 2	Filed Memorandum In Opposition To Hawaii's Objection To Bill of Costs of Plaintiffs-Aplts'. 4/28 -ot-
May 2	Filed Joinder In Objection To Bill of Costs Of Bishop Estate. 4/28 -ot-
May 2	Filed (Inter/Aple Halawa V1y) Joinder In Objection To Bill of Costs of Bishop Estate. 4/29 -ot-
May 2	Filed aplt's (Trustees of the Kamehameha Schools/Bishop Estate) Memorandum in opposition for order lodging exhibits one through forty. (4/29) PANEL sz
May 3	Filed Joint Motion To Withdraw Petition For Rehearing And Suggestion For Rehearing En Banc And An Application To Stay The Mandate

DATE	*FILINGS-PROCEEDINGS*
	Pending An Appeal To The United States Supreme Court Pursuant To 28 U.S.C. § 1254(2). 4/29 (PANEL) -ot-
May 4	Filed Memorandum In opposition To Intervenors-Aples' Objection To Bill of Costs of Plaintiff-Aplts. -ot-
May 6	Recv'd lrt dated April 27, from T. S. Hong, re: substitution of Michael Lilly for Yukio Naito, and lead counsel is proffessor Tribe. sz
May 9	Filed Aplts' Memorandum Opposing Joint Application To Stay The Mandate. 5/6 (Panel) -ot-
May 17	Filed Order (ALARCON, FERGUSON, POOLE, CJJ) The motion to make exhibits one through forty part of the record is denied. Judges Alarcon and Poole have voted to deny the application to stay issuance of the mandate pending appeal to the U.S. Supreme Court. Judge Ferguson has voted to grant the stay of mandate. The application to stay mandate pending appeal is denied. ogm
June 8	Filed Orig & 33 Appellees' (Tom, et al.,) notice of withdrawal of Joint motion to withdraw petition for rehearing and suggestion for rehearing en banc with letter dated 6/7/83. (Panel) 6/7 ogm
June 13	Received on June 3, 1983 appearance of counsel of Richard J. Archer, for Intervenors/Appellees. (pw)
Jun 15	Filed Intervenors-Aples' Notice of Widrawal of Joint Motion To Withdraw Petition For Rehearing And Suggestion of Appropriateness of Rehearing En Banc. 6/15 (Panel) -ot-

DATE	*FILINGS-PROCEEDINGS*
June 17	Filed Order (ALARCON, FERGUSON, POOLE, CJJ) The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The joint motion to withdraw the petition for rehearing and suggestion for rehearing en banc is dismissed as moot. The several notices of withdrawal of the above joint motion are dismissed as moot. ogm
Jun 27	MANDATE ISSUED
Jun 27	Filed Motion For Award of Plaintiffs-Appellants' Attys' fees Or For Remand With Directions To Ward Fees. 6/24 (CIVATT) -ot-
Jul 11	Filed Joint Defendants-Appellees' and Intervenors-Appellees' objection To Plaintiff-Appellants' Application For Attorneys' Fees And Memorandum of Points And Authorities In Support of Objections. 7/8 (CIVATT) -ot-
Jul 11	Filed Intervenors-Appellees' [KAHALA COMMUNITY, ETC., ET AL.] Opposition to Plaintiffs-Appellants' Motion For Award of Attys' Fees. 7/8 (CIVATT) -ot-
Jul 13	Filed Aplts' Reply Memorandum In Support of Plaintiffs-Appellants' Motion For Award of Attys' Fees. 7/12 (CIVATT) -ot-
Jul 15	Filed Intervenors-Aples' Notice of Appeal To The Supreme Court of The United States. 7/14 -ot-
Jul 15	Filed Aples' Notice of Appeal to SC. 7/14 -ot-
Jul 19	Filed Inter-Aples [KAHALA COMM ASSOC., ET AL.] Notice of Appeal To The Supreme Court of The United States. 7/18 -ot-
Jul 19	Filed Aplt's Emergency Motion To Recall Or Clarify Mandate. 7/19 (Panel)

DATE	*FILINGS-PROCEEDINGS*
Jul 20	Filed Memorandum In Opposition To Emergency Motion To Recall Or Clarify Mandate. 7/19 (Panel) -ot-
July 21	Filed Order (ALARCON, POOLE and FERGUSON, CJJ) The panel has considered aplts' emergency motion to recall or clarify the mandate and has concluded that it is not of an emergent nature. In accordance with this finding, the appellees are directed to file a response to the motion by 5:00 p.m. Friday, July 29, 1983. Copies of the response shall be served on all parties. Aplts' shall file a reply, if any, no later than 5:30 p.m., Friday, August 5, 1983. ogm
Jul 22	Filed Intervenors-Aples' (HALAWA HILS LAND-SALE COMMITTEE, ET AL.) Joinder In defendants-Aples' Notice of Appeal. 7/21
July 28	Filed Deft-Aple's memorandum in opposition to emergency motion to recall or clarify mandate. 7/27 (PANEL) EM
July 29	Filed Intervenors-Appellees (Halawa Hills) Memorandum in opposition to emergency motion to recall or clarify mandate. 7/29 (PANEL)
July 29	Filed Intervenors-Appellees (Portlock Community) Memorandum in opposition to emergency motion to recall or clarify mandate. 7/28 (PANEL)
Aug 4	Filed Aplt's Reply Memorandum in support of Emergency Motion to recall or clarify mandate. 8/4 PANEL EM
Aug 8	Filed Deft-Aple's (Hawaii) Appendix B to Hawaii's Memorandum in opposition to emergency motion to recall or clairfy mandate. 8/4 PANEL EM

DATE	*FILINGS-PROCEEDINGS*
Aug 8	Received notice from SC of the filing of petition for cert on 7/28/83, SC# 83-141 EM
Aug 11	Filed order (ALARCON, POOLE, & FERGUSON) Aplt's emergency motion to recall the mandate is granted. It appears that this court's opinion of March 28, 1983, reversing the DC's denial to aplts of declaratory and injunctive relief, and holding unconstitutional the Hawaii Land Reform Act, has not been fully understood or implemented pursuant to our mandate. The DC has indicated uncertainty as to our intention set forth in the opinion. We therefore recall the mandate in order that it be clarified for the benefit of the parties and the DC. Within 10 days of the entry of this order the parties may submit supplemental memoranda discussing the form of decree to be issued in the circumstances of this case. Should this court conclude that oral argument is necessary, the parties will be notified by the clerk of the time and place. Pending the issuance of a revised mandate in this appeal, aples the Hawaii Housing Authority and the Intervenors, their agents and all those acting in concert with them, are, except in connection with any appeal or application to the SC of the U.S., enjoined from pursuing any administrative or judicial proceedings, or from initiating any new administrative or judicial proceedings against aplts under chapter 516 of the Hawaii Revised Statues. sz
Aug 17.	Recv'd letter from counsel for aple (Hawaii) re: confirming L.H. Tribe's appearance of counsel. lw
August 17	Filed aple's (State of Hawaii, Wai-Kahala Tract "H") motion to continue the submission of memoranda and determination pursuant to the order

DATE	*FILINGS-PROCEEDINGS*
	of August 11, 1983 until a ruling by the United States Supreme Court on the aples' motion of August 15, 1983. PANEL lw
August 18	Filed Supplemental declaration of R.J. Archer in support of aples' motion to continue the submission of memoranda and determination pursuant to the order of Aug. 11, 1983 until a ruling by the U.S. Supreme Court on the aple's motion of 8/15/83. PANEL (8/18) lw
August 19	Filed aplts' supplementary memorandum in support of emergency motion to recall or clarify mandate. PANEL (8/19) lw
August 19	Filed Order (ALARCON, POOLE, FERGUSON) On August 18, 1983 we recv'd a motion of aple Wai-Kahala Tract "H" and by the State of HI seeking an extension of the time in which the parties are to file the memoranda requested by our Order of Aug. 11, 1983, pending a ruling on an emergency motion to vacate or stay that Order which, we are advised, has been presented by aples to Justice William H. Rehnquist In Chambers. The motion of extension of time is granted. The requested submissions need not be made until further order of the court. lw
August 22	Filed aplts' memorandum in opposition to aples' motion to continue. PANEL (8/19) lw
Aug. 22	Filed intervenors/aples' (Kahala Comm. Asso. & Kahala Comm. Fee Purch. Fund) Supplemental Memorandum. PANEL (8/19) lw
Aug. 22	Filed intrvnrs/aples' (Portlock Comm., Kokohead Comm., W. Marina Comm., Hahaione Valley) Supplemental Memorandum PANEL (8/19) lw

DATE	*FILINGS-PROCEEDINGS*
Aug. 22	Recv'd copy of letter to parties from Clerk's office for the Supreme Court re: requesting aples to file a response. PANEL lw
Aug. 22	Filed intrvnr/aples (State of HI, Wai-Kahala Tract H) memorandum in response to the order of 8/11/83 clarifying the mandate. PANEL 8/18 lw
Aug 31	Filed Appellees' (Trustees) opposition to aplts' motion to vacate or stay order of U.S. Court of Appeals recalling & clarifying mandate. (Panel) 8/19 ogm
Sept 2	R'cvd Notice by SC of filing appeal (2 separate appeals) on 8/10/83 and 8/16/83 (SC Nos. 83-236; 83-283). ogm
Sept 6	R'cvd from aplts' trustees, Kamehameha Schools/ Bishop Estates' counsel, copy of Justice Rehnquist's denial of HHA request to stay Court's order of 8/11/83, etc., (Panel) 9/6 ogm
Sept 7	R'cvd aplt's (State of Hawaii) response to aples' opposition to motion to vacate or stay, submitted to Justice Rehnquist on 8/23/83. (Panel) 9/6 ogm
Sep 9	Filed State of Hawaii's memorandum in response to Order of 8/11/83, recalling the mandate. (Panel) 9/9 ogm
Sept. 9	Filed as of Sept. 8, Order (ALARCON, POOLE & FERGUSON) on Sept. 6, 1983, the Clerk recvd a copy of Justice Rehnquist's memorandum decision in chambers, denying aples' application to stay or vacate this Court's Order of Aug. 11, 1983. The parties have now suggested that in the light of Justice Rehnquist's comments, our resolution of certain aspects of the Aug. 11th Order might be assisted by further briefing by the parties. The Court agrees. It is Ordered, Aples may

DATE	*FILINGS-PROCEEDINGS*
	file their brief by September 16, 1983; aplts may respond by September 24, 1983; and aples may reply by Sept. 27, 1983. The Clerk will advise the parties whether oral hearing will be held. gb
Sept 16	Filed Aple's (WAI-KAHALA TRACT "H" ASSOCIATION) memorandum in response to court's order of 9/8/83. (PANEL) 9/15 ogm
Sept 16	Filed Aples' (KAHALA COMMUNITY ASSN, et al.,) memorandum in response to court's order of 9/8/83. (PANEL) 9/15/83 ogm
Sept. 23	Filed pltf/aplt's (Midkiff) answering memorandum to aples' memorandua concerning order of Aug. 11, 1983. PANEL 9/22 lw
Sept 27	Filed State of Hawaii's reply memorandum re order of August 11, 1983. PANEL 9/27 sz
Sept. 28	Filed aplt's errata sheet for memorandum filed 9/23/83. PANEL 9/27 lw
Sept 30	Filed order (ALARCON, POOLE & FERGUSON) Oral argument will be heard in this case on Monday, October 31, 1983 at 9:00 a.m. at the U.S. DC in Hawaii. Counsel should be prepared to discuss the issues raised in this court's order of August 11, 1983 and September 9, 1983. Each side will be premitted thirty minutes of argument time. sz
Oct 4	Filed Joint emergency motion to expedite hearing on emergency motion to recall or clarify mandate (Intervenor-Aples, Halawa Hills Landsale Committee, et al.,). (Panel) 10/3 ogm
Oct 5	R'cvd letter from E. Barrett Prettyman, Jr., re: topics to discuss in the argument, etc., (Panel)

DATE	*FILINGS-PROCEEDINGS*
Oct 6	Filed aplts' memorandum in opposition to aples' joint emergency motion to expedite hearing on emergency motion to recall or clarify mandate. (Panel) 10/4 ogm
Oct 7	Filed Order (ALARCON, POOLE & FERGUSON, CJJ) The court's schedule cannot accommodate the expedited hearing jointly requested by the several appellees. The motion to expedite the date is denied. Oral argument will be heard as scheduled on Monday, Oct. 31, 1983 at 9:30 a.m. at the United States Courthouse in Honolulu, Hawaii. Each side shall have one hour for argument. The Clerk of Court will designate the courtroom. -ot-
Oct 11	Rec'd Joinder in joint emergency motion to expedite hearing on emergency motion to recall or clarify mandate. 10/7 (moot) -ot-
Oct 25	R'cvd Supplemental affidavit of Clinton R. Ashford. (Panel) 10/25 ogm
Oct. 31	ARGUED in Hawaii before: ALARCON, POOLE, FERGUSON, CJJ. Submission deferred until Nov. 14, 1983. -mlm-
Nov. 3	Filed certified copy of SC order: The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with no. 83-236, ***Portlock Community Assoc. (Maunalua Beach), et al. vs. Frank E. Midkiff, et al.*** and case no. 83-283, ***Kahala Community Assoc., inc., et al vs. Frank E. Midkiff, et al.***, and a total of one hour is allotted for oral argument. (filed in SC on October 31, 1983, SC# 83-141)

DATE	*FILINGS-PROCEEDINGS*
Nov. 3	Filed certified copy of SC order filed in SC 10/31/83 (SC# 83-236) The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with case No. 83-141, *Hawaii Housing Authority, et al. v. Frank Midkiff, et al*, and case no. 83-238, *Kahala Community Assoc., Inc., et al, vs. Frank Midkiff, et al* and a total of one hour is allotted for oral argument. lw
Nov. 3	Filed certified copy of SC order filed in SC 10/31/83 (SC# 83-283) The statement of jurisdiction in this case having been submitted and considered by the Court in this case probable jurisdiction is noted. This case is consolidated with case No. 83-141, *Hawaii Housing Authority, et al. vs. Frank E. Midkiff, et al*, and case No. 83-236, *Portlock Community Assoc., Inc., (Maunalua Beach), et al, vs. Frank Midkiff, et al*, and a total of one hour is allotted for oral argument. lw
Nov 3	Filed Order (ALARCON, POOLE & FERGUSON, CJJ) The parties are requested to advise the Court not later than Nov. 08, 1983 of the exact status, by number of all cases which have been filed as of this date under Chapter 516 by the Houseing Authority against Bishop Estate, including the number of cases already tried, those in which trial actually has begun, and those not yet tried. -ot-
Nov 4	Filed Order (ALARCON, POOLE & FERGUSON, CJJ) In addition to the information previously requested concerning the status of condemnation actions presently pending in Hawaii state courts against Bishop Estate Land under chapter 516, the parties are requested to advise the

DATE	FILINGS-PROCEEDINGS
	court of the number of individual residential lots that are embraced in each of the pending condemnation actions. -ot-
Nov 7	Rec'd letters dated 11/04/83 from the Intervenors-aples' (WAI-KAHALA TRACT H, ET AL.) one addressing the issues of jurisdiction and injuctive relief, and the other letter on a list of suggested exceptions to any injunctive order the court may issue submitted on behalf of Intervenor-aple. Wai-Kahala Tract H. (Panel) 11/04 -ot-
Nov 7	R'cvd letter from aples' Hawaii Atty. Gen., etc., of 11/4/83 in response to court's request on its jurisdiction to issue injunctive relief. (Panel) ogm
Nov 7	Filed aplts' statement of status of Chapter 516 cases filed against Kamehameha Schools/Bishop Estate. (Panel) ogm
Nov 7	R'cvd letter from Kamehameha Schools/Bishop Estate, re: response to court's order during oral argument on 10/31/83 regarding court's jurisdiction, etc. (Panel) ogm
Nov 8	Filed Intervenor-Appellees Kahala Community, etc., memorandum regarding scope of injunctive relief upon issuance of revised mandate

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

vs.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING., NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

VERIFIED COMPLAINT

[Filed In The United States District Court, District of Hawaii, February 28, 1979]

COMPLAINT

Come now FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Plaintiffs, hereinafter for convenience called the "Trustees," and as grounds for their claims for relief against Defendants, allege:

1. *The Parties and Jurisdiction*

(1) Kamehameha Schools/Bishop Estate is a perpetual educational trust, established in 1887 under the will of Princess Bernice Pauahi Bishop. The Trustees are the duly qualified and acting Trustees of the Kamehameha Schools/Bishop Estate and bring this action solely in their capacity as such Trustees.

(2) Defendants PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, and NOBUYOSHI TAMURA are the public member Commissioners, and Defendants ANDREW I. T. CHANG (who is the Director of Social Services, State of Hawaii) and DAVID C. SLIPHER (who is the Special Assistant for Housing, State of Hawaii) are the ex officio voting member Commissioners, who together constitute the Hawaii Housing Authority (hereinafter for convenience called the "HHA"). Defendant FRANKLIN Y. K. SUNN is the Executive Director of the HHA. The HHA is a public body and a body corporate and politic with perpetual existence, created by the Legislature of Hawaii, having powers and duties established by the laws of Hawaii, including H.R.S. Chapters 356 and 516. Each Defendant is sued in his individual as well as his official capacity.

(3) This matter in controversy arises under the Constitution and laws of the United States and exceeds the sum of $10,000, exclusive of interest and costs. This Court has jurisdiction of the controversy and the power to grant the relief sought by the Trustees under the provisions of 28 U.S.C. §§ 1331, 1343 and 2201, and 42 U.S.C. § 1983.

(4) The corpus of the Kamehameha Schools/Bishop Estate consists principally of land in Hawaii, the rental of which generates virtually all of the income of the trust. This income includes annual rentals from leases covering more than 13,500 single family residential lots. The Kamehameha Schools/Bishop Estate devotes its entire net income to the operation of the Kamehameha Schools in Honolulu, Oahu, and extension programs of the Schools conducted at the Schools and at other

places in Hawaii. More than 2,600 full-time students attend the Schools, paying tuition and fees that, at most, cover only approximately fifteen percent (15%) of the costs of operating the Schools. In addition to the regular curricula for full-time elementary, intermediate and high school students, the Schools provide numerous special education programs for children and adults, such as campus summer experiences, family education, and programs for school drop-outs. Many of these are provided free of cost to the participants, who number more than 60,000 annually. The Schools also carry on an extensive educational research program in cooperation with the State of Hawaii Department of Education, the University of Hawaii and other educational institutions, principally aimed at developing successful techniques for the instruction of culturally deprived children. College scholarship funds are made available to certain graduates of the Schools and other local high schools. The Schools depend almost entirely upon the net income from the trust estate and have no other source of support except comparatively insignificant receipts from tuition and fees.

II. *The Statute and Defendants' Actions and Threats*

(5) H.R.S. Chapter 516 empowers the HHA to expropriate, through exercise of the State's eminent domain power, fee simple title to leased residential lots, compensating the lessor/owner at a statutorily limited rate. Upon the initiative and application of twenty five, or more than fifty per cent, of the lessees in a "development tract" (defined in § 516-1(2) as a single contiguous area of not less than five acres, developed and subdivided into single-family residential lots not exceeding two acres in size), the HHA may acquire fee simple title to any one or more of the leased lots in that tract. The HHA must sell the interests so acquired within sixty days to the lessees, upon whose applications the condemnation was effected, at prices which will constitute neither a source of revenue nor a profit for the State or the HHA. The statute encompasses and subjects to expropriation virtually all of the Trustees' leased

residential lots. A true copy of H.R.S. Chapter 516 as amended to date (that is, through the conclusion of the 1978 session of the Legislature of Hawaii) is attached hereto as Exhibit "A" and incorporated herein by reference.

(6) Under the statute, the State may not designate and acquire leased residential lots except upon initiative of the private lessees, through their filing of a petition for designation of the development tract and applications to purchase. H.R.S. § 516-22. Public funds may not be used, and funds furnished by the lessees applying to purchase must be used, for the purchase of the lots applied for unless the lessees are unable to obtain funds from private lenders at reasonable rates. In that event, the HHA may lend public funds to the lessees for the acquisition of fee simple titles. H.R.S. § 516-34. To date, the HHA has expropriated thousands of fee simple titles upon the applications of lessees. These transfers have all occurred on a voluntary basis, however, upon payment by the lessees of a previously agreed-upon price. No public funds have yet been used for any of these conversions. Also, while the statute permits the acquisition of lots as to which no application to purchase has been made (after application for purchase of other lots in the development tract by the minimum number of lessees), the HHA has not in any instance designated and acquired with public funds, or by exchange of public lands, any lot in any development tract. All residential lots designated and acquired in development tracts by the HHA, to date, have been upon the applications of the lessees of those lots, have been paid for with funds supplied by the lessees, and have been transferred to those lessees immediately following acquisition.

(7) The statute requires the HHA to institute eminent domain proceedings, within twelve months after designation, to acquire the fee simple interest in the development tract or portion thereof designated, unless prior thereto "the parties" voluntarily agree to the purchase and sale of the fee simple interest. H.R.S. § 516-23.

(8) Defendants, acting as the HHA and purporting to act under the statute, have commenced expropriation of the Trustees' fee simple title to the residential lots in Waialae-Kahala Neighborhood Tract H (File Plan 559), consisting of 102 leased residential lots. More specifically:

(a) Defendants encouraged the filing of, and accepted, applications by lessees in Tract H to purchase the fee simple title to the lots they hold under lease and petitions by those lessees to designate Tract H as development tract. H.R.S. § 516-22.

(b) After publication of notice, Defendants held a public hearing on the proposed designation and acquisition of Tract H, on April 22, 1977.

(c) Defendants purported to determine, on October 20, 1978, that the acquisition of the Trustees' fee simple title to the leased lots in Tract H and disposition of the same to the lessees thereof would effectuate the so-called public purposes of H.R.S. Chapter 516.

(d) On October 23, 1978, the Defendants directed the Trustees to negotiate with the lessees of Tract H or their representative to determine the amount of the compensation to be paid to the Trustees, pursuant to the statutory formulas.

(e) Following the conclusion of contested, evidentiary hearings, held on November 20, 1978 and November 27, 1978, the Defendants, at their meeting on January 18, 1979, determined that negotiations between the Trustees and the lessees' representative concerning Tract H had failed.

(f) Purporting to act under H.R.S. § 516-51, Defendants by letter dated January 22, 1979 directed the Trustees to submit to mandatory arbitration with the lessees of Tract H lots for the purpose of determining the price to be paid for the Trustees' fee simple interest in the lots. The arbitrators' award will be "prima facie evidence" as to the application of the statutory formulas for determining "compensation" in the eminent domain proceedings to be instituted by the HHA. H.R.S. §§ 516-55, 24 and 1(14).

(g) At their meeting on February 16, 1979, Defendants reaffirmed their January 18, 1979 determination that the Tract H negotiations had failed.

(h) Tract H has been placed on the agenda for a special Hawaii Housing Authority meeting to be held on March 2, 1979.

(9) The Tract H arbitration threatens promptly to proceed to a conclusion and determine values for the Trustees' fee simple interests in the Tract H lots pursuant to the statutory formulas. Thereafter, Defendants intend to designate and acquire the Trustees' fee simple interests in those lots, to use funds provided by the lessees of those lots to make the payment to the Trustees required by H.R.S. Chapter 516, and to convey the titles so acquired to the lessees who are to furnish the funds for acquisition.

(10) In addition to these actions of Defendants with respect to Tract H, Defendants have accepted applications from lessees to purchase, and petitions from lessees to designate for acquisition, the Trustees' fee simple title to several thousand other leased residential lots. Defendants have held public hearings preliminary to designating more than twenty other development tracts and to acquiring the Trustees' fee simple titles to the leased lots within those tracts. Defendants have demonstrated by public statements, by their responses to lessees' applications and petitions, and in other ways, their intention to proceed under the purported statutory authority to acquire such titles for the benefit of the private lessees of the lots by the exercise of the State's power of eminent domain.

(11) All of the Trustees' leases of the residential lots affected by the statute are governed by lease-contracts, examples of which are attached hereto as Exhibits "B" and "C". All of said leases have twenty-five or more years to run until their expiration and approximately half of them were issued many years prior to the effective date of H.R.S. Chapter 516 and its earliest predecessor, Act 307, Session Laws of Hawaii 1967. In Tract H, for example, the Trustees leased all of the 102

residential lots during the period August 1, 1956, through May 1, 1957; only three of said leases have been cancelled and replaced by new leases issued subsequent to the effective date of Act 307. Each of the Trustees' leases establishes a lessor-lessee relationship for a period of fifty-five (55) years. Each lease-contract entitles the Trustees to receive, and obligates the lessee to pay to the Trustees, sums of money for rent and for real property taxes, assessments and other payments on account of the lessee's possession of the residential lot during the full term of the lease.

(12) The Trustees have, during the past decade, sold to several hundred of their lessees the fee simple interest in the lots which they occupied, pursuant to Internal Revenue Service rulings. The most recent of these sales occurred within the past few months. These sales have been made at prices and upon terms mutually agreed upon by the Trustees and their lessees, unrestricted by and without reference to H.R.S. Chapter 516. The Trustees intend to sell their fee simple interest in other lots, but these sales may be frustrated by the actions of the Defendants.

(13) There are many other owners of fee simple title to leased residential lots who are similarly situated with the Trustees. Some of these others own fewer than fifty leased residential lots that are subject to expropriation under the statute and some of them own hundreds of such lots. Some of them are private individuals, trusts or corporations, and others of them are charitable trusts or corporations. The Defendants have accepted applications to purchase and petitions to designate development tracts from thousands of lessees of those other owners; have held public hearings; have designated lots for acquisition; have acquired by eminent domain proceedings (or under the threat of such proceedings); and have transferred to lessees the fee simple titles to hundreds of residential lots leased by said other owners. The Defendants are threatening similarly to designate, acquire and transfer fee simple titles to hundreds or thousands more of the leased residential lots of said other owners.

III. *Unconstitutionality and Illegality*

(14) The acquisition of fee simple titles for lessees in possession, by the use of eminent domain under H.R.S. Chapter 516, deprives the Trustees of their property only for private use, and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(a) The statute is for the sole purpose and has the sole effect of a forced transfer of fee simple titles from the owners thereof to the private lessees who currently occupy and who have the contractual right to continue to occupy the property. The statute is in effect a capital levy, totally unrelated to differences in uses to which land has been and is to be put, which merely transfers the monetary value of fee simple title to private persons. Not only does the statute fail to change current land use, it is specifically designed to continue and confirm the existing use of the affected lots for single-family occupancy.

(b) The statute does not restrict, restrain or regulate the terms or conditions of transfers or subleases or sales of the property after transfer of fee simple titles from the present owners to the lessees, unless state money is used for the purchase of the lessor's interest, in which event the only restriction is that the lessee-purchaser, for ten years, may not transfer the property without first giving the Hawaii Housing Authority the right to buy the land at a specified price. The statute also does not control or govern the use of the expropriated lots by the lessees after their acquisition of fee simple titles through the State's exercise of its eminent domain power. Once acquiring fee simple title, the lessees may lease, sell or otherwise dispose of the lots at any price and, subject only to restriction by county zoning regulations, may put the land to any use and purpose they may choose.

(c) The statute is not and cannot constitutionally be supported by the legislative findings or conclusions therein recited. The findings do not state a constitutionally permissible basis for the exercise of eminent domain, but on the contrary, demonstrate that the taking is not for a permissible public purpose, but merely for the transfer of fee simple title from the

present owners to lessees. Furthermore, these legislative findings are neither supported by the facts recited nor otherwise and do not justify the use of eminent domain in the manner and with the effect provided by the statute. Furthermore, the use of the ultimate governmental power of eminent domain, for the purposes provided by the statute, to seize and transfer fee simple titles from lessors to lessees, is not reasonably related to the legislative findings or conclusions and is neither necessary, appropriate nor effective for the purposes stated in the findings.

(15) Because the statute depends upon private persons to initiate a taking thereunder, H.R.S. § 516-22, it unconstitutionally delegates to private persons the ultimate and sovereign power of eminent domain and vests in private persons the critical powers of selection of the property and initiation of the proceedings. By reason of the foregoing, the statute violates the Fifth and Fourteenth Amendments to the Constitution of the United States. Additionally, by vesting *pro tanto* sovereign power in private persons, it violates Section 3 of the Hawaiian Admissions Act (Act of March 18, 1959; Public Law 86-3; 73 Stat. 4) which guarantees to the citizens of the State of Hawaii a republican form of government.

(16) The statute purports to define the just compensation to which the Trustees are entitled upon condemnation of the fee simple titles to their leased lots and to limit that compensation to determination by statutory formulas. These provisions constitute an unconstitutional legislative usurpation of judicial functions in derogation of rights secured to the Trustees under the Fifth and Fourteenth Amendments to the Constitution of the United States.

(17) The statutory formulas used to compute the compensation to be paid for the fee simple titles taken by eminent domain are neither fair, just nor reasonable. On the contrary, they violate the requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States in that they fail to provide for payment of just compensation for the property condemned. These confiscatory formulas restrict pay-

ment to the smaller of alternative results, that is, the amount most favorable to the lessee, without reference to fairness or any economic or legally permissible basis.

(18) Action taken by the Defendants under the authority of H.R.S. Chapter 516 in directing the Trustees to engage in mandatory arbitration has deprived and will deprive the Trustees of rights secured to them by Article III of, and the Fifth and Fourteenth Amendments to, the Constitution of the United States by requiring them to engage in a process very costly in terms of money, time, attention and energy that

(a) is a determination by a privately selected panel having no authority from or responsibility to any public officer or agency, and whose costs and fees are imposed in part upon the Trustees,

(b) produces an award the statute directs will be prima facie evidence of the just compensation to be paid the Trustees in the eminent domain action thereafter to follow, and

(c) produces an award as to value that is regulated and limited by the statutory valuation formulas and that is as of a date prior in time and unrelated to the date of taking or summons.

(19) The provisions of the statute and the Defendants' actual and threatened actions pursuant thereto, have unlawfully and unconstitutionally interfered with, disrupted and impaired the Trustees' lease-contracts, in violation of Art. I, Section 10 of the Constitution of the United States. Compare, for example, the provisions of Exhibits "B" and "C" on the one hand and the provisions of H.R.S. § 516-24, 1(14), 26, 61, 63 to 66, and 70 on the other.

(20) An actual and present controversy exists between the Trustees and the Defendants concerning legal rights asserted by the Defendants and denied by the Trustees in matters in which they both have a concrete interest.

WHEREFORE, the Trustees pray that:

(1) This Court issue a preliminary injunction restraining the Defendants from any further proceedings with respect to the

Trustees or the Trustees' leased residential lots pending final determination of this Complaint;

(2) This Court find and declare that H.R.S. Chapter 516 is unconstitutional;

(3) This Court issue a permanent injunction against the Defendants, enjoining them from taking any action whatsoever under the purported authority of H.R.S. Chapter 516 with respect to the Trustees or the Trustees' leased residential lots;

(4) This Court award the Trustees their costs, expenses and attorneys' fees incurred in bringing this action; and

(5) This Court grant such other relief to the Trustees as may be equitable in the premises.

DATED: Honolulu, Hawaii; February 27, 1979.

[Exhibits "A," "B," and "C," and Summons omitted in printing]

Plaintiffs' Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

vs.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

[Filed in the United States District Court,
District of Hawaii, February 28, 1979]

Plaintiffs, through their undersigned counsel, hereby move the Court for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure to enjoin Defendants, their officers, agents, employees, attorneys and all those in active concert or participation with them, from taking or continuing with any action in respect to Plaintiffs or Plaintiffs' residential leasehold property pursuant to H.R.S. Chapter 516, to order Defendants to suspend their recent direction to Plaintiffs to arbitrate the compensation to be paid for Plaintiffs' fee

simple interest in Waialae-Kahala Neighborhood Subdivision Tract H lots and to stay any proceedings pursuant to or in implementation of that direction to arbitrate, until a final hearing hearing and determination of the merits in the above-entitled action.

Unless Defendants are restrained and enjoined by order of this Court, Plaintiffs will suffer immediate and irreparable injury, loss and damage in that they will be deprived of their property without due process or just compensation, will suffer losses of leasehold revenue essential to the operations of the Kamehameha Schools, will be distracted and harassed with negotiations, arbitrations and condemnation suits to the extent they and their staff will be unable to perform their duties under the trust and the interests of the trust beneficiaries will be seriously prejudiced, and will incur extraordinary expenses for the protection of their contractual and property rights without any possibility of reimbursement and with the likelihood that it will all have been for naught when this Court grants the relief prayed for in Plaintiffs' Complaint. These aggravated injuries to Plaintiffs' constitutional property, contractual and economic rights will inevitably occur during the period required for this Court to adjudicate the issues presented by Plaintiffs' Complaint if this Court fails to restrain and enjoin Defendants as moved by Plaintiffs. This motion is made on the additional ground that Plaintiffs have no adequate remedy at law.

Plaintiffs base their motion upon the Verified Complaint, the Memorandum in Support of Motion, and Affidavits of Alfred J. Dow, Jr. and William Van Allen filed herewith, and upon such further evidence and argument as may be presented upon a hearing of this Motion.

DATED: Honolulu, Hawaii, February 28, 1979.

[Memorandum in Support of Motion for Preliminary Injunction, Affidavit of William Van Allen, Affidavit of Alfred J. Dow, Jr., and Notice of Motion omitted in printing]

Temporary Restraining Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

vs.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

TEMPORARY RESTRAINING ORDER

[Filed in the United States District Court, District of Hawaii, February 28, 1979]

The Court has considered Plaintiffs' Motion for Temporary Restraining Order pending the hearing and determination of Plaintiffs' Motion for Preliminary Injunction; the Verified Complaint; the Memorandum in Support of Motion for Temporary Restraining Order, and Affidavit of Matsuo Takabuki attached thereto; and the Memorandum in Support of Motion for Preliminary Injunction and Affidavits of Alfred J. Dow, Jr. and William Van Allen filed herein; and it appearing that Defendants have ordered Plaintiffs into mandatory arbitration

pursuant to H.R.S. Chapter 516 with respect to their residential leasehold lots in Waialae-Kahala Neighborhood Subdivision Tract H, and that Plaintiffs ultimately may be deprived of their fee simple interest in Tract H without due process or just compensation, and that Defendants threaten to inundate Plaintiffs with additional costly and time-consuming procedures which have the potential of depriving Plaintiffs of the remainder of their residential leasehold property, again without the benefit of due process or just compensation; and it appearing from the Attorney's Certificate filed herein that Defendants and their attorneys received notice of the hearing; and

On the basis of these pleadings and papers, it appears to the Court that before Defendants or their attorneys can receive notice in the time generally required for such proceeding, Defendants' actions in regard to Plaintiffs and Plaintiffs' residential property would alter the status quo between Plaintiffs and Defendants and cause Plaintiffs immediate and irreparable injury, loss and damage;

IT IS THEREFORE ORDERED that:

1. Defendants suspend their order communicated by letter dated January 22, 1979, ordering the Plaintiffs into mandatory arbitration with respect to their residential leasehold lots in Waialae-Kahala Neighborhood Subdivision Tract H and stay any proceedings pursuant to or in implementation of that direction to arbitrate.

2. Defendants, their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them, are enjoined and restrained from taking any other action with respect to Plaintiffs and Plaintiffs' residential property pursuant to H.R.S. Chapter 516, until such time as Plaintiffs' Motion for Preliminary Injunction can be heard and determined.

3. Plaintiffs' Motion for Preliminary Injunction will be heard by this Court 10:00 o'clock a.m. on March 10, 1979.

4. As a condition for obtaining this Order, Plaintiffs must post a letter of credit or other security in the sum of $100.00.

5. The temporary restraining order issued herein will expire on March 10, 1979, unless within such time the order is extended for good cause shown, or unless Defendants consent to an extension.

DATED: Honolulu, Hawaii; Feb. 28, 1979.

/s/ SAMUEL P. KING
United States District Judge

State Defendants' Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants.

ANSWER TO COMPLAINT

[Filed in the United States District Court,
District of Hawaii, March 20, 1979]

Comes now the Hawaii Housing Authority, Commissioners of the Hawaii Housing Authority, and Franklin Sunn, by WAYNE MINAMI, Attorney General of the State of Hawaii, (hereinafter called the State Defendants) and in answer to the complaint filed herein admit, deny, and allege as follows:

FIRST DEFENSE:

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE:

2. The State Defendants admit the allegations contained in paragraphs 1 and 2 of the Complaint.

3. The State Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. As to paragraph 4 of the Complaint, the State Defendants are without sufficient knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint, and therefore deny the same.

5. As to paragraph 5 of the Complaint, the State Defendants admit that a true copy of Chapter 516, Hawaii Revised Statutes, is attached to the Complaint as Exhibit A, but deny the remaining allegations contained in paragraph 5 of the Complaint.

6. As to paragraph 6, State Defendants deny those allegations purporting to set forth the legal effect of Section 516-22 and Section 516-34, Hawaii Revised Statutes, as those sections are self-explanatory. The State Defendants deny the remaining allegations contained in paragraph 6 of the Complaint.

7. As to paragraph 7 of the Complaint, State Defendants deny the allegations purporting to set forth the legal effect of Section 516-23, Hawaii Revised Statutes, as that section speaks for itself.

8. As to paragraph 8 of the Complaint, the State Defendants deny the allegations as set forth in that paragraph.

(a) As to subparagraph (a), the State Defendants deny the allegtions contained in that subparagraph.

(b) As to subparagraph (b), the State Defendants admit the allegations contained in that subparagraph.

(c) As to subparagraph (c), the State Defendants admit that on October 20, 1978, the State Defendants determined that the acquisition of the Trustees' fee simple title to the leased lots in Tract H, and the disposition of the same to the lessees would effectuate the public purposes of chapter 516, Hawaii Revised Statutes.

(d) As to subparagraph (d) the State Defendants deny the allegations contained in that subparagraph.

(e) As to subparagraph (e) the State Defendants admit that impasse in negotiations between the Trustees and the lessees of Tract H had occurred by operation of law pursuant

to Amended Rule 10, Section 10, of the Rules and Regulations of the Department of Social Services and Housing, Hawaii Housing Authority.

(f) As to subparagraph (f), the State Defendants admit the allegations contained in that subparagraph, except that the State Defendants directed arbitration for the purpose of determining the "owner's basis".

(g) As to subparagraph (g) the State Defendants admit to the reaffirmation of their determination that impasse in negotiations in Tract H resulting from operation of law had occurred pursuant to Amended Rule 10, Section 10 of the Rules and Regulations of the Department of Social Services and Housing, Hawaii Housing Authority.

(h) As to subparagraph (h) of the Complaint, the State Defendants admit that Tract H was placed on the agenda for a special Hawaii Housing Authority meeting to be held on March 2, 1979, but with respect to Tract H, that meeting was only for the purpose of conferring with the attorney for Hawaii Housing Commission, and that no decision on any matter was contemplated concerning Tract H.

9. The State Defendants deny the allegations in paragraph 9 of the Complaint.

10. As to paragraph 10 of the Complaint, the State Defendants admit the allegations contained in the first two sentences, but deny the allegations contained in the last sentence of the paragraph.

11. As to paragraphs 11 and 12 of the Complaint, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore deny the same.

12. As to paragraph 13 of the Complaint, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore deny the same, except that the State Defendants admit that they have accepted applications to purchase and petitions to designate development tracts from lessees of

owners other than Bishop Estate; have held public hearings; have designated lots for acquisition; have acquired by eminent domain proceedings (or under threat of such proceedings); and have transferred to lessees the fee simple titles to residential lots leased by said other owners.

13. As to paragraphs 14, (a), (b), (c); 15; 16; 17; 18, (a), (b), (c); 19 and 20; the State Defendants deny the allegations contained in those paragraphs.

14. Any allegation in the Complaint not heretofore admitted or denied is hereby denied.

THIRD DEFENSE:

15. Plaintiffs have failed to exhaust their administrative remedies.

FOURTH DEFENSE:

16. Plaintiffs are bound by the judgment entered in *Frank E. Midkiff, et al., vs. Ronald Y. Amemiya, et al.*, First Circuit Court of the State of Hawaii, Civil No. 47103, and are estopped to relitigate the matters decided in that action.

FIFTH DEFENSE:

17. The issues raised in the Complaint are not ripe for adjudication.

SIXTH DEFENSE:

18. This court should abstain from ruling on the matters raised in the Complaint until such time as State courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

SEVENTH DEFENSE:

19. The Plaintiffs' claims are barred by laches.

EIGHTH DEFENSE:

20. The Plaintiffs' claims are barred by estoppel.

NINTH DEFENSE:

21. The Plaintiffs' claims are barred by waiver.

TENTH DEFENSE:

22. The Plaintiffs have failed to join indispensable parties.

ELEVENTH DEFENSE:

23. The Plaintiffs lack standing to assert to claims in the Complaint.

TWELFTH DEFENSE:

24. The Plaintiffs' claims are barred by the Doctrine of Unclean Hands.

THIRTEENTH DEFENSE:

25. The Plaintiffs' claims are barred by the Eleventh Amendment of the United States Constitution.

FOURTEENTH DEFENSE:

26. The Plaintiffs' claims are barred by the Doctrine of Official Immunity of the State Defendants sued in their official and individual capacities.

FIFTEENTH DEFENSE:

27. This Court lacks jurisdiction over the subject matter of this claim.

WHEREFORE, State Defendants pray that the Court find and declare that Chapter 516, Hawaii Revised Statutes, is constitutional, dismiss Plaintiffs' Complaint, and grant such other relief that the Court deems appropriate.

DATED: Honolulu, Hawaii, March 20, 1979.

Order Allowing Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

v.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I: PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE IKI COMMUNITY ASSOCIATION; WAIAU COMMUNITY ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.; KAHALA COMMUNITY

FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,

Intervenors.

ORDER GRANTING MOTIONS TO INTERVENE

[Filed in the United States District Court,
District of Hawaii, March 23, 1979]

The Motions to Intervene as party defendants by WAI-KAHALA TRACT "H" ASSOCIATION, INC., HALAWA HILLS LAND-SALE COMMITTEE, AWAKEA ASSOCIATION, ALII SHORES COMMUNITY ASSOCIATION, ENCHANTED HILLS, UNIT I, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH), KOKOHEAD COMMUNITY LEASE-FEE, INC., WEST MARINA COMMUNITY ASSOCIATION, KALAMA VALLEY COMMUNITY ASSOCIATION, MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC., HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., KAMILOIKI COMMUNITY ASSOCIATION, LUNALILO MARINA COMMUNITY ASSOCIATION, MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE, SPINNAKER ISLE ASSOCIATION, WAIALAE IKI COMMUNITY ASSOCIATION, WAIAU COMMUNITY ASSOCIATION, KAHALA COMMUNITY ASSOCIATION, INC., KAHALA COMMUNITY FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION, having been heard by this Court on March 14, 1979 at 10:00 o'clock a.m. with counsel for all parties and movants having been present, and the Court having considered the memoranda and arguments of the parties and movants,

IT IS HEREBY ORDERED that the Motions to Intervene are granted.

DATED: Honolulu, Hawaii, March 23, 1979.

/s/ SAMUEL P. KING
Judge of The Above-Entitled Court

Intervenors' Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,
Plaintiffs,

vs.

PAUL A. TOM, et al.,
Defendants.

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,
Intervenors.

ANSWER OF INTERVENING DEFENDANTS

[Filed in the United States District Court,
District of Hawaii, March 23, 1979]

Intervening Defendants above-named, answering the Complaint of Plaintiffs FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, allege as follows:

1. Intervening Defendants admit the allegations of paragraphs 1 and 2 of the Complaint.

2. Intervening Defendants deny the allegations of paragraph 3 of the Complaint.

3. Intervening Defendants are without knowledge as to the truth of the allegations of paragraph 4 of the Complaint.

4. Answering paragraph 5 of the Complaint, Intervening Defendants admit that Exhibit "A" to the Complaint is a true

copy of H.R.S. Chapter 516 as amended through 1978. Intervening Defendants deny that this Chapter in any way empowers the HHA to "expropriate" any fee simple title to leased residential lots, or provides for the payment of less than just compensation upon the exercise of the State power of eminent domain. Intervening Defendants deny that the Chapter authorizes the HHA to acquire fee simple title to leased lots solely and merely upon the application of lessees, or that such application is sufficient to effect condemnation, or that the HHA must in all circumstances sell fee simple interests acquired by condemnation to lessees residing thereon. Defendants affirmatively allege that prior to designation by the HHA of any area of residential houselots for acquisition, notice, hearing, and findings by HHA that such designation would effectuate the public purposes of Chapter 516 are required. Defendants admit that Chapter 516 defines a "development tract" as set forth in paragraph 5 of the Complaint, and that actions of the HHA pursuant to this Chapter are not intended to be a source of immediate revenue or direct monetary profit to the State, but deny that actions of the HHA pursuant to Chapter 516 will not constitute a benefit and profit to the State of Hawaii, and affirmatively allege that actions by the HHA under Chapter 516 constitute a profit to the State of Hawaii by effectuating the public purposes of this Act.

5. Answering paragraph 6 of the Complaint, Intervening Defendants admit that H.R.S. § 516-22 calls for the initiation of administrative proceedings at the behest of residential lessees such as Intervening Defendants through petition and application, and that H.R.S. § 516-34 provides that the use of public funds to finance purchases by lessees of the fee interest in residential houselots is limited to situations where reasonable private financing is not available. Intervening Defendants deny that public funds may not be used for the purchase of fee interests acquired by the HHA by this Act, and affirmatively allege that Chapter 516 provides for the use of such funds, through general obligation bonds of the State (H.R.S. § 516-45), issuance of bonds or obligation by the HHA (§ 516-40),

and establishment of a fee simple residential revolving fund (§ 516-44), among other provisions. Intervening Defendants deny that the HHA has "expropriated" any fee simple titles upon the application of lessees under Chapter 516. Intervening Defendants do not understand the allegation of paragraph 6 that "expropriations" have taken place in voluntary fee sales at prices agreed upon by the lessors and lessees concerned, and therefore must deny these allegations. Intervening Defendants admit that the HHA has not designated for acquisition or acquired with public funds or by exchange of public lands any lot in any development tract, and that all lots designated and acquired to date have been paid for with funds supplied by the lessees, and have been transferred to those lessees immediately following acquisition. Intervening Defendants affirmatively allege that this procedure has been carried out with the voluntary agreement, consent and cooperation of affected lessors/ fee owners.

6. Intervening defendants admit the allegations of paragraph 7 of the Complaint.

7. Answering paragraph 8 of the Complaint, Intervening Defendants deny that the HHA has in any way commenced "expropriation" of the Trustees' fee simple interest in Waialae-Kahala Neighborhood Tract H. Intervening Defendants admit that the HHA has accepted applications to purchase and petitions for designation from the members of Intervening Defendant Wai-Kahala Tract H Association Inc., and held a public hearing on the proposed designation and acquisition of Tract H on April 22, 1977. Intervening Defendants admit that the HHA on October 20, 1978 found that the public purposes of Chapter 516 would be effectuated by the acquisition of Tract H. Intervening Defendants deny that on October 20, 1978 the HHA directed the trustees to negotiate with the lessees of Tract H or their representatives to determine the amount of compensation to be paid to the trustees pursuant to the statutory formulas. Intervening Defendants affirmatively allege that on October 23, 1978, pursuant to Resolution No. 1694, the HHA requested the trustees to voluntarily negotiate

with Intervening Defendant the Wai-Kahala Tract H Association, Inc. to determine the trustees' basis in the lots in Tract H, requesting the trustees' cooperation with the lessees in negotiations to establish a just price for the trustees interest without resort to further proceedings under H.R.S. Chapter 516. Intervening Defendants admit that following evidentiary hearings, the HHA determined on January 18, 1979 that voluntary negotiations between the trustees and Intervening Defendant Wai-Kahala Tract H had failed. Intervening defendants admit that the HHA by letter dated January 22, 1979, ordered the trustees to begin mandatory arbitration under H.R.S. Chapter 516. Intervening Defendants deny that this arbitration is "for the purpose of determining the price to be paid" for the trustees' fee simple interest in the affected area. Intervening Defendants affirmatively allege that this arbitration, under H.R.S. Chapter 516, is not part of any action in condemnation or eminent domain; the decision of the aribtrators as to what would constitute just compensation for the trustees' fee simple interest in the affected area is not binding on the trustees, nor are the arbitrators empowered to issue any award transferring or purporting to transfer title to any property interest, or to order the trustees to sell or surrender any property interest. Intervening Defendants affirmatively allege that this arbitration is to apply the laws of the State of Hawaii relating to just compensation to the affected areas, to determine a fair and just price for the trustees' interest in these areas. Intervening Defendants affirmatively allege that this amount is subject to revision by the courts of the State of Hawaii at the behest of either party to the arbitration. Intervening Defendants deny that the arbitrators award will be "prima facia evidence" as to "the application of the statutory formulas for determining 'compensation' in the eminent domain proceedings to be instituted by the HHA." Intervening Defendants affirmatively allege that the arbitrators award will be prima facia evidence as to just compensation in any condemnation proceeding which may be instituted by the HHA, if such proceedings are ever instituted. Intervening Defendants admit that on February 16, 1979 the HHA reaffirmed their July 18, 1979 determination

that negotiations between the trustees and intervening defendant Tract H had failed, and that Tract H was placed on the agenda for a special HHA meeting on March 2, 1979.

8. Answering paragraph 9 of the complaint, Intervening Defendants admit that intervening defendant Tract H intends to pursue mandatory arbitration pursuant to H.R.S. Chapter 516. Intervening Defendants are without knowledge as to what the award of the arbitrators will be, and are without knowledge as to whether the figure decided upon by the arbitrators as "just compensation" will be satisfactory to the trustees and to Intervening Defendant Tract H, rendering further proceedings unnecessary. Intervening Defendants are informed and believe that the trustees want to sell their fee simple interest in the affected area, and will sell to Intervening Defendant Tract H lessees without any eminent domain proceedings being instituted if agreement can be reached as to price. Intervening Defendants are without knowledge as to the likelihood or necessity of further action by the HHA following arbitration.

9. Answering paragraph 10 of the complaint, Intervening Defendants admit that the HHA has accepted applications and petitions for areas other than Tract H, and has held public hearings pursuant thereto. Intervening Defendants deny that the HHA is proceeding on such applications for the private benefit of lessees, and affirmatively allege that the HHA is proceeding to effectuate the public purposes of H.R.S. Chapter 516.

10. Answering paragraph 11 of the complaint, Intervening Defendants admit that they are representatives of lessees of the trustees under written lease contracts, and are without knowledge as to the remaining allegations of this paragraph.

11. Intervening Defendants are without knowledge as to the truth of the allegation of paragraph 12.

12. Intervening Defendants are without knowledge as to the truth of the allegations of paragraph 13.

13. Intervening Defendants deny the allegations of paragraphs 14 through 20 of the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim for which relief may be granted.

THIRD DEFENSE

Plaintiffs' lawsuit is premature because they have failed to exhaust their State remedies.

FOURTH DEFENSE

Plaintiffs' claims are barred by estoppel.

FIFTH DEFENSE

Plaintiffs' claims are barred by waiver.

SIXTH DEFENSE

Plaintiffs' claims are barred by laches.

WHEREFORE, Intervening Defendants pray:

1. That the Complaint be dismissed

2. That they have their costs, expenses, attorneys' fees and any other and further relief as the Court deems just.

DATED: Honolulu, Hawaii, March 22, 1979.

Intervenors' Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

KAHALA COMMUNITY ASSOCIATION INC. and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND,

Defendant-Intervenors.

ANSWER TO COMPLAINT

[Filed in the United States District Court,
District of Hawaii, March 27, 1979]

The Kahala Community Association, Inc. (hereinafter the "Association") and the Kahala Community Association Fee Purchase Fund (hereinafter the "Fund"), for answer to the Complaint, admit, deny and allege as follows:

FIRST DEFENSE:

1. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE:

2. Intervenors admit the allegations contained in paragraphs 1 and 2 of the Complaint.

3. Intervenors deny the allegations contained in paragraphs 14, 15, 16, 17, 18, 19 and 20 of the Complaint.

4. Intervenors are without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraphs 9, 10, 11 and 12 of the Complaint.

5. For answer to paragraph 3, Intervenors deny that this Court has jurisdiction of the controversy pursuant to 28 U.S.C. § 1343 or 42 U.S.C. § 1983 but admit the remaining allegations of paragraph 3 of the Complaint.

6. Intervenors admit that allegations contained in the first two sentences of paragraph 4 but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 4 and therefore deny the same.

7. For answer to paragraph 5, Intervenors admit that a true copy of Chapter 516, Hawaii Revised Statutes, is attached to the Complaint as Exhibit A, but deny the remaining allegations contained in paragraph 5 of the Complaint.

8. For answer to paragraph 6, Intervenors deny those allegations purporting to set forth the legal effect of Section 516-22 and Section 516-34, Hawaii Revised Statutes, which sections speak for themselves. Intervenors admit that the HHA has not to date used public funds to convert leasehold lots to fee simple. Intervenors deny the remaining allegations contained in paragraph 6.

9. For answer to paragraph 7, Intervenors deny the allegations purporting to set forth the legal effect of Section 516-23, Hawaii Revised Statutes, which section speaks for itself.

10. For answer to paragraph 8 of the Complaint, Intervenors admit the allegations contained in subparagraph 8(b), (c), (e), (f), (g) and (h), but deny the remaining allegations contained in paragraph 8.

11. For answer to paragraph 13, Intervenors admit that various leasehold development tracts not owned by Bishop Estate are subject to Chapter 516, and that fee conversion has been instituted or completed with respect to some of those tracts. Intervenors deny the remaining allegations contained in paragraph 13.

12. Intervenors deny all allegations of the Complaint not specifically answered hereinabove.

THIRD DEFENSE:

13. Plaintiffs have failed to exhaust their administrative remedies.

FOURTH DEFENSE:

14. Plaintiffs are bound by the judgment entered in *Frank E. Midkiff, et al. vs. Ronald Y. Amemiya, et al.*, First Circuit Court of the State of Hawaii, Civil No. 47103, and are estopped to relitigate the matters decided in that action.

FIFTH DEFENSE:

15. The issues raised in the Complaint are not ripe for adjudication.

SIXTH DEFENSE:

16. This Court should abstain from ruling on the matters raised in the Complaint until such time as state courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

SEVENTH DEFENSE:

17. Plaintiffs' claims are barred by laches.

EIGHTH DEFENSE:

18. Plaintiffs' claims are barred by estoppel.

NINTH DEFENSE:

19. Plaintiffs' claims are barred by reason of waiver.

TENTH DEFENSE:

20. Plaintiffs have failed to join indispensable parties.

ELEVENTH DEFENSE:

21. Plaintiffs lack standing to the claims asserted in the Complaint.

TWELFTH DEFENSE:

22. Plaintiffs' claims are barred by the Doctrine of Unclean Hands.

WHEREFORE, Defendant-Intervenors pray that the Court find and declare that Chapter 516, Hawaii Revised Statutes, is constitutional, dismiss Plaintiffs' Complaint, award Defendant-Intervenors their reasonable attorneys' fees and costs of suit, and grant such other relief as the Court deems appropriate.

DATED: Honolulu, Hawaii, March 26, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,
Plaintiffs,

vs.

PAUL A. TOM, et al.
Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,
Defendant-Intervenors.

DEFENDANT-INTERVENOR'S ANSWER TO COMPLAINT

[Filed in the United States District Court, District of Hawaii, March 28, 1979]

Defendant-Intervenor Halawa Valley Estates Fee Conversion Corporation (hereinafter referred to as "Intervenor"), for answer to the Complaint filed herein, alleges as follows:

1. Intervenor admits the allegations contained in Paragraphs 1 and 2 of the Complaint.

2. Intervenor denies the allegations contained in Paragraphs 14, 15, 16, 17, 18, 19 and 20 of the Complaint.

3. Intervenor is without knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Complaint.

4. For answer to Paragraph 3, Intervenor denies that this Court has jurisdiction of the controversy pursuant to 28 U.S.C. § 1343 or 42 U.S.C. § 1983; but admits the remaining allegations of Paragraph 3 of the Complaint.

5. Intervenor admits the allegations contained in the first two sentences of Paragraph 4, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4, and the same are, therefore, denied.

6. For answer to Paragraph 5, Intervenor admits that a true copy of Chapter 516, Hawaii Revised Statutes, is attached to the Complaint as Exhibit "A," but denies the remaining allegations contained in Paragraph 5 of the Complaint.

7. For answer to Paragraph 6, Intervenor denies those allegations purporting to set forth the legal effect of H.R.S., §§ 516-22 and 516-34, which sections speak for themselves. Intervenor admits that the Hawaii Housing Authority has not to date used public funds to convert leasehold lots to fee simple. Intervenor denies the remaining allegations contained in Paragraph 6.

8. For answer to Paragraph 7, Intervenor denies the allegations purporting to set forth the legal effect of H.R.S., § 516-23, which section speaks for itself.

9. For answer to Paragraph 13, Intervenor admits that various leasehold development tracts not owned by Bishop Estate are subject to Chapter 516, Hawaii Revised Statutes, and that fee conversion has been instituted or completed with respect to some of those tracts. Intervenor denies the remaining allegations contained in Paragraph 13.

10. Intervenor denies all allegations of the Complaint not specifically answered hereinabove.

SECOND DEFENSE:

11. Plaintiffs are bound by the judgment entered in ***Frank E. Midkiff, et al. v. Ronald Y. Amemiya, et al.***, First Circuit Court of the State of Hawaii, Civil No. 47103, and are estopped to relitigate the matters decided in that action.

THIRD DEFENSE:

12. This Court should abstain from ruling on the matters raised in the Complaint until such time as State Courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

WHEREFORE, Intervenor prays that the Court find and declare that Chapter 516, Hawaii Revised Statutes, is constitutional, dismiss Plaintiffs' Complaint, award Intervenor its reasonable attorney's fees and costs of suit, and grant such other relief as the Court deems appropriate.

DATED: Honolulu, Hawaii, March 28, 1979.

State Opposition to Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants.

STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On February 28, 1979, Plaintiffs filed a Motion for Preliminary Injunction, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, to "suspend" State Defendants' recent direction to Plaintiffs to arbitrate the valuation of Plaintiffs' lease fee interest in certain property pursuant to Chapter 516, Hawaii Revised Statutes, the Hawaii "Land Reform Act." Plaintiffs' speculative arguments do not adequately justify a resort to the drastic remedy of a preliminary injunction. For the reasons discussed below, Plaintiffs' motion should be denied.

• • •

V

THE DOCTRINE OF ABSTENTION IS APPLICABLE TO THE INSTANT CASE

A. *Introduction.*

The doctrine of abstention was first recognized by the United States Supreme Court in *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) as applicable to a case which could have been resolved on questions of state law. In that case, Pullman was seeking to enjoin the enforcement of an order of the Commission claiming violations of its rights under the Fourteenth Amendment. Mr. Justice Frankfurter, speaking for a unanimous court, stated:

> But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court in Texas. *In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.* [Citations omitted.] The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the function of a premature constitutional adjudication. 312 U.S., at 499-500. (Emphasis added.)

The doctrine of abstention was described succinctly as follows:

> Where (1) unsettled questions of state law are enmeshed with federal questions in determining the validity and constitutionality of a state law or of state action, and (2) the state law problems are delicate ones, resolution of

> which is not without substantial difficulty, proper exercise of federal jurisdiction requires that the controversy be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal questions, usually a federal constitutional question. This is the "doctrine of abstention." The doctrine is not founded upon lack of power or jurisdiction but upon a sound judicial discretion of the District Court to decline to exercise jurisdiction in a proper case. *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Couch Employees of America, AFL-CIO v. Dalton*, 206 F.Supp. 629, 633 (W.D. Mo. 1962).

The doctrine has been applied and affirmed by a number of federal courts: *Struthers v. Robertson Lumber Co.*, 173 F.Supp. 204, 206 (D. Minn. 1959) ("Here we are asked to exercise our authority, including our equitable powers, in a case involving the construction and constitutionality of the laws of a sovereign foreign state involving an internal hassle between stockholders of a corporation created under that state's laws. We think this is a situation in which we should apply the doctrine of abstention. This embodies the exercise of our discretion to withhold the employment of our authority *in a matter primarily of state concern because of the rightful independence of the state governments and the authority of their courts to determine controversies peculiar to the state.*" (Emphasis added.)); *McCarty v. Borough of Ramsey*, 270 F.2d 232, 234 (3d Cir. 1959) ("[T]he state courts should be the ones to initially interpret their own statutes."); *Detroit Edison Co. v. East China Township School Dist. No. 3*, 247 F.Supp. 296, 305 (E.D. Mich. 1965) ("[T]he federal courts will generally abstain from holding a state statute unconstitutional until the state courts familiar with the local law have had an opportunity to construe it."); *Stadler v. County School Bd. of Prince Edward Ct., Va.*, 387 F.Supp. 997, 1000 (E.D. Va. 1974) ("Different situations dictate the application of one or more of the various recognized abstention doctrines: 1) to avoid decision of a federal constitutional question where the case may be

disposed of on questions of state law; . . . and 3) to leave to the states the resolution of unsettled questions of state law."); *Ahrensfeld v. Stephens*, 528 F.2d 193, 197 (7th Cir. 1975) ("Another is the susceptibility of a state statute attacked in federal court on constitutional grounds to a construction by a state court that would avoid or modify the constitutional questions."); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 71 F.R.D. 573, 575 (S.D. Cal. 1976) ("A corollary to the proposition that constitutional questions may be resolved by mootness in a state proceeding is the tenet that federal courts should leave to the states the resolution of unsettled questions of state law.") *Betts v. Reliable Collection Agency*, 422 F.Supp. 1140, 1142 (D. Haw. 1976) ("The general rule is that abstention is proper where resolution of the uncertain issue of state law 'might end the litigation and not give rise to any federal constitutional claim.' "). *Nehring v. Ariyoshi*, 443 F.Supp. 228, 230-231 (D. Haw. 1977) ("The *Pullman* doctrine requires a federal court to consider abstaining from decision in order to avoid unnecessary conflict with state policies whenever a federal constitutional issue may be avoided or presented in a different posture by a state court determination of an issue of relevant state law . . . . Only if the state statute is 'fairly susceptible' to a construction which avoids or limits the constitutional question is abstention appropriate.")

Clearly, if a state statute is ambiguous or vague or nonspecific in the terms of its operation or application, and is susceptible to a constitutional interpretation by the state courts, this Court not only may abstain, but must abstain.

In *Nehring*, *supra*, this Court expounded upon the two views held by the United States Court regarding the *Pullman* doctrine of abstention. This Court noted that two distinct factual situations exist for abstention:

> In this case, it is helpful to consider two different factual situations which may call for abstention. First, a state statute may be ambiguous, with one possible construction of the statute avoiding or substantially limiting

> the federal constitutional question. Alternatively, a clear statute may possibly violate an unconstrued state constitutional provision. If the state constitutional provision nullifies the statute, there is no need to reach the federal question. *Nehring, supra* at 231.

This Court then discussed the cases of *Reetz v. Boganich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970)[5] and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) and noted the existing dichotomy:

> The Court seems to have set up a dichotomy, albeit an unarticulated one, based upon the nature of the state constitutional issue which could be raised. If the state claim is merely the local equivalent of an important federal right then abstention is unnecessary. *On the other hand, if the state claim extends to an interest primarily protected by the individual state's authority, particularly in a case involving a complex statutory and constitutional scheme, a federal court should allow the state courts to resolve the case in the first instance. . . . Nehring, supra* at 233. (Emphasis added.)

This interpretation was based upon the distinction expressly noted by this Court quoting *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84-85, 95 S.Ct. 870, 875, 43 L.Ed.2d 32 (1975).

> In [*Constantineau*], we declined to order abstention where the federal due process claim was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution. *But where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district court to abstain.* (citing *Reetz*) . . . . *Nehring, supra* at 233. (Emphasis added.)

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5 The Court, in *Reetz* ordered abstention because ". . . the nub of the whole controversy may be the state constitution," 397 U.S., at 87.

Clearly, this action falls within the distinction noted by the Supreme Court. We have as will be described *infra*, an integrated scheme of related constitutional provisions, statutes and regulations. Furthermore, as will be shown, this scheme as a whole, requires a clarifying interpretation by the courts of the State of Hawaii.

Therefore, Defendants submit that abstention is appropriate.

* * *

Intervenors' Opposition to Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

KAHALA COMMUNITY ASSOCIATION, INC., and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND,

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

[Filed by Intervenors Kahala Community Association *et al.* on April 20, 1979]

* * *

VII. CONCLUSION.

Plaintiffs simply have not met the standards required for issuance of a preliminary injunction. They have failed to demonstrate truly irreparable injury. Moreover, any inconvenience to plaintiffs if arbitrations proceed is more than outweighed by the damage that will flow to lessees by further delaying procedures that, due to stringent procedural safeguards, are already extremely time consuming.

Nor is there any real likelihood plaintiffs will prevail on the merits. Their arguments concerning public purpose are rendered untenable by the legislative findings and the substantial case law in the area. Insofar as valuation formulas are concerned, no constitutional problems arise if these are read as guidelines rather than ironclad limitations on what compensation may be awarded by the condemnation court. The valuation date set by Chapter 516 is simply a matter of procedure. Furthermore, it appears that Hawaii courts will require payment of interest from the designation date to the date of judgment, thereby compensating lessor for any loss of appreciation after the designation date.

So far as arbitration procedures are concerned, plaintiffs have presented nothing that compels the conclusion that such procedures are unconstitutional. Not only are these procedures well recognized methods for resolving disagreements concerning real estate values, but the panel's award is nothing more than prima facie evidence for use in the condemnation trial.

Finally, the fact that arbitration precedes designation does not render the procedure either unworkable or unconstitutional. The arbitration panels will certainly be able to devise methods to adjust valuations to future dates, and the lessor and lessee will have ample opportunity to demonstrate at trial or on appeal any error in that regard.

Accordingly, KCA submits that plaintiff's motion should be denied.

DATED: Honolulu, Hawaii, April 20, 1979.

Intervenors' Opposition to Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

Hearing Date: April 24, 1979

FRANK E. MIDKIFF, et al.,

Plaintiffs,

v.

PAUL A. TOM, et al.,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

[Filed by Intervenors Wai-Kahala Tract "H" Ass'n *et al.* on April 23, 1979]

* * *

XI. CONCLUSION

Due to history and geography, in 1967 when the original Hawaii Land Reform Act was passed the Hawaii Legislature was faced with a unique situation. In 1967, and later in 1975, the Legislature expressly found that the peculiar Hawaiian system of residential leaseholds had undesirable social and economic effects, and was part of the broadest problems, such as inflation, facing the State as a whole.

The Legislature chose not to adopt a statute implying a private option to purchase the fee in residential leaseholds, or to utilize other governmental powers such as those of taxation or regulations to address these problems of public concern. Instead, the Legislature made the decision to employ the

mechanism of eminent domain, with its corresponding requirement of just compensation, to effectuate its public purposes in attacking these problems. This rational Legislature's perception of problems of public concern, and the mechanism chosen to confront these problems, should not be upset by this court, which cannot substitute its own judgment for that of the Legislature. To state that the Hawaii Land Reform Act represents the exercise of the governmental power of eminent domain solely for "private use" is to deny history, geography, and local reality.

Given the public purposes, and thus "public use," behind the exercise of eminent domain embodied in the Hawaii Land Reform Act, mere speculation and supposition as to how this Act will be applied by State courts in the exercise and their judicial duties must be rejected. Plaintiffs' Motion for a Preliminary Injunction against the Hawaii Land Reform Act must be denied.

DATED: Honolulu, Hawaii, April 23, 1979.

Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

PRELIMINARY INJUNCTION

[Filed in the United States District Court,
District of Hawaii, June 8, 1979]

This cause came on for hearing on Plaintiffs' Motion for Preliminary Injunction on April 24-27, 1979, and the Court having considered the Verified Complaint, the memoranda and affidavits submitted in support of the motion and in opposition thereto, and having heard oral evidence and received documentary evidence in open Court upon hearing of the motion, and the Court having made and filed on May 8, 1979, its Decision on the Motion for Preliminary Injunction, setting forth the Court's findings and reasons,

IT IS HEREBY ORDERED that Defendant Hawaii Housing Authority, its commissioners, officers, agents, servants, em-

ployees and attorneys, and all persons in active concert and participation with it be, and hereby are, restrained and enjoined, pending entry of final judgment following a trial on the merits of Plaintiffs' Verified Complaint, from and against:

(1) effectuating its order communicated to Plaintiffs by letter dated January 22, 1979, to commence mandatory arbitration pursuant to Hawaii Revised Statutes Chapter 516, Part IIA with respect to their residential leasehold lots located in Waialae-Kahala Subdivision Tract H, Oahu, Hawaii; and

(2) ordering any mandatory arbitration pursuant to or under the purported authority of Hawaii Revised Statutes Chapter 516, Part IIA, in regard to any other development tract or leasehold residential lots;

(3) confining the methods to be used for determining "owner's basis" to the two methods set forth in Section 516-1 (14) (A) and (B), Hawaii Revised Statutes;

PROVIDED that Plaintiffs first give security in the sum of ten thousand dollars ($10,000) for the payment of such costs and damages as may be incurred or suffered by any party who is found upon final determination of this action to have been wrongfully enjoined.

IT IS FURTHER ORDERED that provisions for negotiations under Hawaii Revised Statutes Chapter 516, Part IIA, and that provisions outside of Hawaii Revised Statutes Chapter 516, Part IIA, specifically designation and commencement of condemnation proceedings, are not enjoined under this preliminary injunction.

DATED: Honolulu, Hawaii, June 8, 1979.

/s/ SAMUEL P. KING
United States District Judge

Intervenors' Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in the United States District Court,
District of Hawaii, September 18, 1979]

Defendants WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al. (hereinafter referred to as "WAI-KAHALA") respectfully move this court for Partial Summary Judgment. As a matter of law, this court should hold that the legislative findings, specifically HAW.REV.STAT. § 516-83, establish a proper constitutional basis for the Hawaii Land Reform Act.

This Motion for Partial Summary Judgment is made pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Memorandum in Support of Motion for Partial Summary Judgment, Affidavits of John Hulten and I. Nelson Rose, and verified copy of the legislative findings attached hereto, the

pleadings and files herein, and incorporating by reference the Memoranda filed by Defendants Kahala Community Association, Inc., et al., and Defendant State of Hawaii on August 3, 1979, and the legislative history and statutes previously introduced as evidence.

DATED: Honolulu, Hawaii, September 18, 1979.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. *Statement of Facts*

Plaintiffs have filed suit challenging the constitutionality of the Hawaii Land Reform Act, Chapter 516, Hawaii Revised Statutes. Plaintiffs allege that the Hawaii Land Reform Act unconstitutionally deprives Plaintiffs of their property by improper exercise of the power of eminent domain (see Section III of Plaintiffs' verified complaint). In part, Plaintiffs allege that Chapter 516 is unconstitutional because the legislative findings do not and cannot support the use of eminent domain (see paragraph 14 (c) of Plaintiffs' verified complaint).

In enacting and amending the Hawaii Land Reform Act, the Hawaii State Legislature incorporated extensive legislative findings and declarations of necessity and purpose. HAW.REV.STAT. § 516-83. The Legislature recognized that the concentration of land ownership in the State of Hawaii and the corollary refusal of these large landholding estates to sell their urban residential property has adversely affected the health, welfare, security and happiness of the people of the State of Hawaii. Specifically, the Legislature has declared that the residential leasehold situation has contributed to the shortage of residential fee land, the artificial inflation of land prices, the increasing cost of living, possible future economic instability and disruption, and therefore justifying the use of eminent domain by the State of Hawaii.

While representing that they will attack the legislative findings, Plaintiffs have not and will not specify what particular findings they will challenge.

In order to narrow the actual issues to be adjudicated at trial, Defendant WAI-KAHALA now moves for Partial Summary Judgment asserting as a matter of law that (1) there is a strong presumption for constitutional validity in the instant case; (2) the burden is on Plaintiffs to affirmatively disprove all these legislative findings and establish that the Legislature acted arbitrarily and capriciously; and (3) there is a reasonable basis for these legislative findings sufficient to protect them from constitutional attack.

* * *

[Exhibit and Affidavits omitted in printing]

Intervenors' Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in the United States District Court,
District of Hawaii, September 27, 1979]

Defendant-Intervenors, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., move this Court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, upon the following issues:

1. The legislative findings of Chapter 516, Hawaii Revised Statutes, are supported by fact;

2. The use of the eminent domain process as contemplated by Chapter 516, Hawaii Revised Statutes, is reasonable, necessary, and appropriate; and

3. The exercise of the power of eminent domain pursuant to Chapter 516, Hawaii Revised Statutes, is for a public purpose.

Defendant-Intervenors, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., join in the Motion for Partial Summary Judgment filed herein by WAI-KAHALA TRACT "H" ASSOCIATION, INC., and incorporate by reference the affidavits and memorandum filed therewith.

This Motion is based upon the Motion for Partial Summary Judgment and its affidavits and memorandum filed as aforesaid, together with the pleadings filed herein and the memorandum filed herewith.

DATED: Honolulu, Hawaii, September 27, 1979.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant-Intervenors, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC. ("Defendants"), join in the Motion for Partial Summary Judgment filed by Defendant-Intervenors, WAI-KAHALA TRACT "H" ASSOCIATION, INC., ("WAI-KAHALA"), and, additionally, seek summary judgment on the related issues of (1) whether the use of the eminent domain process under Chapter 516 is reasonable, necessary, and appropriate; and (2) whether the exercise of the power of eminent domain pursuant to Chapter 516 is for a public use. These additional issues are presented because the granting of the Motion for Partial Summary Judgment filed by WAI-KAHALA will be dispositive of these two additional issues.

* * *

Conclusion

The necessity, expediency, location, and extent of taking property for a public purpose are legislative and administrative questions and are not subject to judicial review absent fraud, bad faith, or abuse of discretion on the part of the Legislature. The Plaintiffs have not raised any such issues by their pleadings, nor does the record reflect any evidence giving rise to a legitimate issue of fraud, bad faith, or abuse of discretion on the part of the legislature.

Moreover, through judicial notice and the presumption in favor of upholding legislation, there is no legitimate issue of fact as to the basic facts underlying the legislative finding of a public use or purpose. At the most, the Plaintiffs can raise only an issue which is debatable. Debatable issues must be resolved in favor of upholding the legislation; and therefore, summary judgment must be granted to Defendants on these issues.

DATED: Honolulu, Hawaii, September 27, 1979.

State Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN INTERVENORS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDA IN SUPPORT OF MOTIONS

[Filed in United States District Court,
District of Hawaii, October 19, 1979]

Come now Defendants by and through their attorneys, WAYNE MINAMI, Attorney General, R. BRIAN TSUJIMURA and ALLAN G. KAWADA, Deputy Attorneys General, and YUKIO NAITO, Special Deputy Attorney General, State of Hawaii, and hereby join in the Motions for Partial Summary Judgment and Memoranda in support thereof brought by Intervenors WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al., and PORTLOCK COMMUNITY ASSOCIATION, KOKOHEAD COMMUNITY LEASE-FEE, INC., WEST MARINA COMMUNITY ASSOCIA-

TION and HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., filed in the above-entitled action on September 18, 1979 and September 27, 1979, respectively.

DATED: Honolulu, Hawaii, October 18, 1979.

Intervenors' Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN MOTIONS FOR PARTIAL SUMMARY JUDGMENT

[Filed in United States District Court, District of Hawaii, October 24, 1979]

Defendant-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund hereby join in the Motion for Partial Summary Judgment filed herein by Defendant-Intervenors Wai-Kahala Tract "H" Association, Inc., et al., on September 18, 1979, and in the Motion for Partial Summary Judgment filed herein by Defendant-Intervenors Portlock Community Association et al. on September 27, 1979.

DATED: Honolulu, Hawaii, October 24, 1979.

Intervenors' Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiff,

vs.

PAUL A. TOM, et al.,

Defendants,

and

KAHALA COMMUNITY ASSOCIATION, INC., and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND,

Defendant-Intervenors.

MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSAL OF CLAIMS AND ENTRY OF FINAL JUDGMENT

[Filed in the United States District Court, District of Hawaii, February 19, 1980]

Defendant-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund move for partial summary judgment on the issues of whether the condemnation provisions of Chapter 516, Haw. Rev. Stat., constitute impairment of contract or an impermissible delegation of eminent domain powers, for dismissal as nonjusticiable of claims premised on Article 3 of the Hawaiian Admissions Act,

dismissal without prejudice of claims that § 516-26, and §§ 516-61 through 516-70 unconstitutionally impair the obligation of contracts, and for entry of final judgment incorporating these and the prior rulings of this Court.

This motion is based upon Rule 56(b), Federal Rules of Civil Procedure, the record and file herein, and the attached Memorandum in Support of Motion.

DATED: Honolulu, Hawaii, February 19, 1980.

[Memorandum in Support omitted in printing]

Intervenors' Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

and

WAIKAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in the United States District Court, District of Hawaii, March 11, 1980]

Defendant-Intervenors Wai-Kahala Tract "H" Association, Inc., et al., hereby join in the Motion for Partial Summary Judgment filed herein by Defendant-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund on February 19, 1980.

DATED: Honolulu, Hawaii, March 11, 1980.

State Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in United States District Court, District of Hawaii March 27, 1979]

Defendants, PAUL A. TOM, et al. (State Defendants) hereby join in the Motion for Partial Summary Judgment filed herein by Defendants-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund on February 19, 1980.

DATED: Honolulu, Hawaii, March 27, 1980.

Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,
Plaintiffs,

vs.

PAUL A. TOM, et al.,
Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,
Intervenors.

FINAL JUDGMENT AND PERMANENT INJUNCTION

[Filed in the United States District Court,
District of Hawaii, June 10, 1980]

The Court having filed its Decision on Motion for Preliminary Injunction on May 8, 1979 and its Amended Memorandum Decision on December 19, 1979,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the mandatory arbitration provisions of Hawaii Revised Statutes Chapter 516, Part IIA and the provisions of Hawaii Revised Statutes § 516-1(14) prescribing the methods to be used in determining just compensation are unconstitutional. Defendant Hawaii Housing Authority, its commissioners, offi-

cers, agents, servants, employees and attorneys, and all persons in active concert and participation with it be, and hereby are, permanently restrained and enjoined from and against:

(a) ordering or effectuating any mandatory arbitration pursuant to or under the purported authority of Hawaii Revised Statutes Chapter 516, Part IIA, in regard to any development tract or leasehold residential lots; and

(b) effecting any taking in which the compensation to be paid is limited by the methods set forth in Hawaii Revised Statutes § 516-1(14).

2. The TEN THOUSAND DOLLARS ($10,000) posted by Plaintiffs, as security for the payment of costs and damages as a condition of issuance of the Preliminary Injunction filed June 8, 1979, and the sum of ONE HUNDRED DOLLARS ($100) posted by Plaintiffs, as security for costs and damages as a condition of issuance of the Temporary Restraining Order filed February 28, 1979, shall forthwith be returned to Plaintiffs.

3. Issues raised by the Complaint concerning Hawaii Revised Statutes § 516-24 (second sentence), § 516-26 and §§ 516-61 through 516-70 are not ripe for review, and as to these issues the complaint is dismissed without prejudice.

4. Plaintiffs' claims premised on Article 3 of the Hawaiian Admissions Act are nonjusticiable and accordingly will be dismissed with prejudice.

5. The Court notes that it has not specifically ruled on the following motions:

(a) April 6, 1979 Motion to Take Judicial Notice;

(b) April 18, 1979 Motion to Compel Discovery and Impose Sanctions;

(c) April 19, 1979 Motion to Compel Production of Documents;

(d) April 20, 1979 Appeal of Magistrate's Order Denying Plaintiffs' Motion to Compel Discovery;

(e) April 20, 1979 Motion in Limine;

(f) August 3, 1979 Motion for Order Declaring Certain Facts Be Taken as True; and

(g) November 26, 1979 Motion to Compel Discovery and Impose Sanctions.

Some of the issues raised by these Motions may have been decided *sub silentio* by previous decisions of this Court. To the extent that issues raised by these Motions have not been decided *sub silentio*; and to the extent that such issues are not *specifically* covered by this Order; the Court considers such issues either not ripe for adjudication, or such that they need not be decided.

6. On all other issues raised by the Complaint and not disposed of above, judgment is granted in favor of Defendants and Defendant-Intervenors, and against Plaintiffs.

7. All parties shall bear their own costs.

DATED: Honolulu, Hawaii, June 10, 1980.

/s/ SAMUEL P. KING
United States District Judge

Plaintiffs' Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

NOTICE OF APPEAL

[Filed in the United States District Court,
District of Hawaii, July 9, 1980]

Notice is hereby given that FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from Paragraphs 4 and 6 of the Final Judgment and Permanent Injunction entered in this action on the 10th day of June, 1980.

DATED: Honolulu, Hawaii; July 9, 1980.

Intervenors' Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

Civil No. 79-0096

U.S. District Court
District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees,

BRIEF FOR PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE INC.; WEST MARINA COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC. AS INTERVENOR-APPELLEES

[Filed January 20, 1981]

* * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does the use of the State's power of eminent domain under the Hawaii Land Reform Act for condemnation of lessors' interests in residential houselots comport with due process of law?

II. Do the legislative findings set forth in the Land Reform Act and the supporting legislative history provide a constitutional justification for the exercise of the taking power?

III. Was the Motion for Summary Judgment in favor of the Defendants providently granted by the Federal District Court?

IV. Is the Land Reform Act constitutional under the Contracts Clause contained in Article I, § 10 of the U.S. Constitution?

* * *

Intervenors' Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

USDC Civil No. 79-0096

On Appeal From the United States District Court
for the District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees,

ANSWERING BRIEF OF DEFENDANT-INTERVENOR-APPELLEES KAHALA COMMUNITY ASSOCIATION, INC. AND KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND

[Filed February 23, 1981]

I. *QUESTIONS PRESENTED*

A. Are Chapter 516 Condemnations for a Public Use?

B. Does Chapter 516 Deny Substantive Due Process?

C. Did the District Court Err in Granting Summary Judgment?

D. Does Chapter 516 Violate the Contracts Clause?

• • •

Intervenors' Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

Civil No. 79-0096

Brief for Appellees

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—VS.—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees.

INTERVENOR-APPELLEES, WAI-KAHALA TRACT "H" ASSOCIATION, INC., HALAWA HILLS LANDSALE COMMITTEE, AWAKEA ASSOCIATION, ALII SHORES COMMUNITY ASSOCIATION, ENCHANTED HILLS, UNIT I, KALAMA VALLEY COMMUNITY ASSOCIATION, MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC. KAMILOIKI COMMUNITY ASSOCIATION, LUNALILO MARINA COMMUNITY ASSOCIATION, MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE SPINNAKER ISLE ASSOCIATION, WAIALAE IKI COMMUNITY ASSOCIATION, AND WAIAU COMMUNITY ASSOCIATION

BRIEF FOR INTERVENOR-APPELLEES

[Filed February 23, 1981]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Do The Legislative Findings Provide A Constitutional Base For The Hawaii Land Reform Act?

A. Was The District Court correct in ruling that the legislative did not act arbitrarily?

B. Was the District Court correct in granting Defendants' motions for summary judgment, thus precluding Plaintiff-Appellants from contesting each and every one of the legislative findings in a full trial?

II. Is the Hawaii Land Reform Act constitutional?

A. Was the District Court correct in ruling that the Act fulfills a public purpose?

B. Was the District Court correct in ruling that the Act did not violate the Contract Clause of the U.S. Constitution?

* * *

State Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 80-4368

U.S. District Court, District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Defendants, Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

[Filed February 24, 1981]

Paul A. Tom, et al., the commissioners and executive director of the Hawaii Housing Authority, and Hawaii Housing Authority respectfully submit their Answering Brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the taking of fee simple title of lessors of leasehold residential lots by eminent domain and the subsequent sale of the fee title to the lessees of the lots a taking for a public use, where such taking and sale are for the purpose of dispersing the fee simple ownership of residential lots, otherwise held by a

few large landowners, to as many people as possible and for the achievement of other legislatively stated social and economic goals.

2. Is the use of the power of eminent domain appropriate and reasonable to cure the problems of concentration of fee simple ownership of land in a few landowners, the shortage of the fee simple residential lots, and other undesirable social and economic conditions found by the Legislature to exist.

3. Did the District Court properly grant summary judgment against the Trustees when, based on commonly known facts about landownership and shortage of fee simple residential lots in Hawaii and on legislative findings and declaration of purpose, the Court was able to conclude that the Legislature acted rationally and not arbitrarily in enacting Chapter 516.

4. Does the fact that the exercise of eminent domain under Chapter 516 results in the termination of existing leasehold contracts between the Trustees and their lessees violate the Contract Clause of the Federal Constitution.

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Intervenors' Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Re: *Midkiff v. Tom*, No. 80-4368

USDC Civil No. 79-0096

BRIEF OF DEFENDANT-INTERVENOR-APPELLEES KAHALA COMMUNITY ASSOCIATION AND KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND ON ABSTENTION

[Filed Nov. 3, 1981]

Introduction

This letter is written pursuant to the court's request for additional briefing concerning case or controversy requirements and abstention issues.

Defendants-intervenors-appellees Kahala Community Association and Kahala Community Association Fee Purchase Fund ("KCA") submit that examination of the authorities and the record in this case establish the following:

1. Throughout this case there has been a case or controversy concerning the constitutional issues present in this appeal.

2. *Pullman*-type abstention is improper in this case because there is no state law issue that will preclude the necessity of resolving the federal constitutional issues. Furthermore, application of *Pullman*-type abstention procedures would seriously frustrate state policies concerning disposition of eminent domain actions.

3. *Burford*-type abstention is improper because the federal constitutional issues here are clearly severable from any non-federal issues.

4. *Younger*-type absention is inapplicable to this case based upon existing case law. The obstacle posed by existing cases is the apparent requirement that state court

proceedings be commenced before substantial proceedings in the federal case. Here, no condemnation action was filed until long after the court's preliminary injunction rulings. KCA submits that although this case might be brought within an abstention doctrine by logical extension of cases subsequent to *Younger*, such extension would be appropriate only to avoid a reversal of the district court on the grounds the statute is unconstitutional. In other circumstances, there is no practical prospect of interference with state policies or pending proceedings, and hence no need to consider extension of *Younger* principles.

Status of Pending Condemnation Actions

To place following discussion in context, it is first necessary to discuss the status of state condemnation actions.

At the time this suit was filed, no condemnation actions had been filed. Chapter 516 and implementing administrative regulations precluded the filing of condemnation actions until various administrative steps were completed. One of these steps was arbitration of values. Bishop Estate filed the complaint after it was ordered into arbitration.

The complaint sought to enjoin not just arbitration, but all administrative proceedings under Chapter 516, primarily on the ground that the underlying statute was unconstitutional.

A temporary restraining order was issued that precluded the Hawaii Housing Authority ("HHA") from issuing or enforcing arbitration orders, or from taking any subsequent steps toward condemnation.

The court issued a preliminary injunction decision in May 1979, holding that the trustees were unlikely to prevail on the public use issue. But the court did hold that mandatory arbitration provisions were unconstitutional and enjoined such proceedings. It also questioned the constitutionality of certain "owner's basis" provisions, but issued no injunction on that issue.

Entry of the preliminary injunction freed the HHA to proceed with administrative steps that were preliminary to condemnation. However, it took several months for completion of those proceedings. The first condemnation actions

(involving subdivisions known as Tracts A, C and H) were filed on September 21, 1979—three days after filing of the first summary judgment motion in this case. In those actions, as in all subsequent actions, the HHA was the plaintiff, and both Bishop Estate and the lessees were named as defendants.

The Tract A, C and H actions were settled by a negotiated sale of lots, as was one subsequent action involving KCA lessees. Numerous other actions are now pending. At present, KCA attorneys are representing lessee defendants in six state court condemnation actions and representing six other community associations in administrative proceedings that are preliminary to institution of condemnation actions.

Following the district court's rulings, the Hawaii Legislature in 1980 amended Chapter 516 to remove provisions requiring arbitration and to amend the "owner's basis" definition. These amendments effectively eliminated the constitutional infirmities identified in the district court's preliminary injunction decisions and final judgment.

No condemnation action has yet been tried. However, at least two state judges have issued orders holding that Chapter 516 condemnations are for a public use. One such order (copy attached) was entered by Judge J. H. Wakatsuki in *Hawaii Housing Authority v. James C. Castle, et al.*, Civil No. 62181, Circuit Court of the First Circuit, State of Hawaii. A similar order was entered by Judge Arthur S. K. Fong in *Hawaii Housing Authority v. Midkiff, et al.*, Civil No. 60465, Circuit Court of the First Circuit, State of Hawaii. That order (furnished to this court by KCA's letter of October 21) held that Chapter 516 was for a public purpose and was constitutional under both the United States Constitution and the Hawaii Constitution. In both such orders, the courts took judicial notice of *Midkiff v. Tom* but did *not* premise the orders on *res judicata*.

Civil No. 62181 involved a lessor other than Bishop Estate, and Civil No. 60465 has been, or will shortly be, settled and dismissed. KCA submits, however, that at a minimum these decisions show that state judges are reaching the same constitutional conclusions as those rendered by Judge King.

A case or controversy has existed at all relevant times.

As previously noted, this suit was filed before the HHA had completed all the administrative steps that are prerequisites to filing a condemnation action. The full panoply of steps required by statute and regulation to begin a condemnation action is summarized in KCA's Preliminary Injunction Memorandum, CR 101 at 4-7.

In overview, HHA first must review lessee applications to determine preliminarily whether statutory eligibility requirements have been met. The HHA then holds public hearings and makes a preliminary determination as to whether acquisition of the tract will further the purposes of Chapter 516.

If such a finding is made, the next steps directly affect the lessor: the HHA requests lessor and lessees to negotiate the value of the fee interests. (Section 516-68, Hawaii Revised Statutes, further requires the parties to bargain in good faith.) Under the version of the statute in force at time of trial (but since amended), if these negotiations failed the parties were required to submit to mandatory arbitration of values. Once arbitration was completed, HHA was permitted to designate the tract for acquisition. Designation was (and is) a prerequisite to condemnation actions. Under the prior statute, the arbitration results were to be used as prima facie evidence of value in any ensuing condemnation proceeding.

Bishop Estate initiated this suit when HHA ordered it to arbitrate values in the first tract that completed pre-arbitration procedures. Through the preliminary injunction hearing, HHA was completing the steps preliminary to statutory negotiation and arbitration of interests in thousands of other Bishop Estate leases. (See testimony of HHA official K. Kohatsu, 4/24/79 RT at 236-46).

The complaint sought to enjoin *any* proceedings by the HHA under Chapter 516 pertaining to Bishop Estate's numerous subdivisions. The complaint (CR 1) quite clearly sought to halt every action by HHA, from the initial acceptance of leesses' purchase applications to the actual filing of condemnation suits.

Both in the complaint and in subsequent proceedings seeking a preliminary injunction, plaintiffs contended that the HHA should be enjoined from taking any steps pursuant to Chapter 516 on the grounds that the entire statute constituted an unconstitutional violation of the public use requirement. In its effort to halt all HHA proceedings, Bishop Estate briefed the public use issue extensively in preliminary injunction memoranda (CR 2 at 10-22, CR 112 at 4-8), and argued vigorously at the preliminary injunction hearing that the statute was facially unconstitutional. (4/24/79 RT at 415-422).

Thus, in order to rule on plaintiff's request to enjoin all HHA proceedings, either preliminarily or permanently, the court was forced to confront the threshold issue of whether Chapter 516 was premised upon a valid public purpose. The court indeed addressed that issue in its preliminary injunction decision, determining that the act was probably constitutional.

The constitutional issues, of course, remained for final decision at the time of ruling on plantiff's request for a permanent injunction and judgment. By that point, only one additional consideration was involved. At the preliminary injunction hearing, the parties stipulated that the court could take legislative findings as true in evaluating the public use issue. However, plaintiff's complaint alleged the legislative findings were erroneous.

In September 1979, lessees sought summary judgment on the public use issue, relying primarily upon the presumptions of constitutionality and regularity which attach to legislative acts and findings. Plaintiffs responded with affidavits that did not meet the requirements of Rule 56. Further, they stated in a memorandum (CR 140 at 13-14) that they would not seek to disprove all legislative findings, but only intended to present evidence that the legislature's theories regarding inflation were erroneous. These materials fell far short of showing that the legislative facts could not reasonably be conceived to be true by the legislature. Since legislative acts are presumptively constitutional, and since states are not required to present current empirical proof that legislative findings are correct (*Vance v. Bradley*, 440 U.S. 93, 110-111 and n. 28 (1979); *Barry v.*

Barchi, 443 U.S. 55, 68 (1979); *see Minnesota v. Clover Leaf Creamery*, 66 L. Ed. 2d 659, 668-69 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978)) the court proceeded to grant summary judgment.

The court's ruling on the constitutional validity of Chapter 516 was thus in no sense an anticipatory ruling on defenses to be advanced in condemnation actions. Bishop Estate's constitutional arguments were advanced in an effort to halt all the administrative proceedings in which Bishop Estate and lessees were then embroiled. A determination of the constitutional validity of Chapter 516 was essential to resolution of those claims and, as illustrated by the activity of all parties, these issues were the subject of vigorous controversy.

Pullman-*type abstention is inapplicable to this case*

KCA submits that *Pullman*-type abstention is clearly inapplicable to the present case.

This court has repeatedly stated that there are three requirements for *Pullman*-type abstention:

> 1. The complaint must touch a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
>
> 2. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
>
> 3. The possibly determinative issue of state law is doubtful.

Isthmus Landowners Association v. California, 601 F.2d 1087, 1091 (9th Cir. 1979); *Sederquist v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir. 1976).

The second and third requirements are clearly not satisfied here.

Bishop Estate has filed identical answers in each case in which KCA lessees are involved. Those answers assert that Chapter 516 violates the federal constitution and Article I,

Sections 5 and 20 of the Hawaii Constitution dealing with due process, equal protection and public use. They also claim that HHA has not complied with its own rules in initiating the condemnations.

The state constitutional claims involve provisions that are mirror images of federal constitutional provisions. Such state claims afford no basis for *Pullman*-type abstention. *Pue v. Sillas*, 632 F.2d 74, 80-81 (9th Cir. 1980).

Nor is Pullman abstention authorized in this case by reason of claims of administrative error. In the state actions, defendant has never identified any specific claimed error. More importantly, any finding that administrative error occurred as to one suit would, as a practical matter, simply result in additional administrative proceedings. Once any procedural deficiencies are corrected the constitutional issues will remain.

In short, there is no perceivable state issue that could possibly make it unnecessary to confront the constitutional questions. As noted above, unless it is clear that there is a doubtful state law issue that could render unnecessary a decision of the federal constitutional question, *Pullman* abstention is impermissible.

KCA recognizes that in the *Isthmus Landowners Association*, *Sederquist* and *Rancho Palos Verdes* cases, this court directed *Pullman* abstention in cases involving land regulation. The fact that land is involved here creates a superficial similarity to those decisions. But they differ dramatically from this case in that each involved assertions that a particular land use action by local government or commission involved an improper taking without compensation. At issue in each case was whether agencies had exceeded regulatory powers conferred by state law with respect to specific parcels. Here, by contrast, the law quite clearly authorizes the HHA to exercise eminent domain power with respect to residential leaseholds.

There are two other reasons why *Pullman*-type abstention is inappropriate. First, as the court recognized in *Pue* (632 F.2d at 78), a decision to abstain involves the exercise of discretion, which will be disturbed only upon a clear error of judgment in weighing the relevant factors. *Id.*

In this case, the State of Hawaii's Memorandum in Opposition to Motion for Preliminary Injunction (CR 96 at 82-103), urged that the court abstain. As the case then stood, that argument was viable. The State's abstention suggestion was addressed to the arbitration and owner's basis provisions of the statute. The State took the position that these provisions were subject to a limiting construction that could alter the constitutional issues before the court. Although the State also suggested the court should abstain as to public use questions, it never suggesed that limiting constructions were available and did not seriously press that argument.

In any event, Bishop Estate filed a memorandum opposing abstention (CR 113) and the district court failed to abstain as to any issues. While the court's decision to proceed to the federal constitutional issues was perhaps arguable so far as unconstrued arbitration and valuation issues are concerned, those issues have been mooted by the legislature's amendment of the statute. So far as the public use question was concerned, no one ever suggested a state law construction that could moot the federal issues. In light of the express legislative declaration that Chapter 516 condemnations are for a public use, it is difficult to perceive how failure to abstain on that issue could possibly constitute an abuse of discretion.

The third reason *Pullman*-type abstention is inappropriate in this case is that procedural ramifications of *Pullman* would frustrate basic state policies concerning eminent domain actions.

When abstention is ordered on *Pullman* grounds, a plaintiff is permitted to preserve constitutional issues for federal court adjudication pending resolution of state court issues. In light of the fact that Bishop Estate has raised constitutional issues as affirmative defenses in pending condemnation actions, it is questionable whether reservation is permissible at this point. But if reservation were permitted, the effect would be to frustrate a carefully drawn state procedure for carrying out eminent domain actions in an orderly and expeditious fashion.

It is self-evident that the constitutional question of public use may be involved in any eminent domain proceeding.

Hawaii's policy is to encourage resolution of any public use questions before trial of valuation and other issues. To that end, Section 101-34, Hawaii Revised Statutes, provides that any party to a condemnation action may request and obtain an immediate trial on any public use issue, and further provides an interlocutory appeal as of right from the result of that trial. Moreover, Section 101-34 provides that such appeals shall be given precedence in the Hawaii Supreme Court.

Thus, Hawaii has established a procedure to encourage resolution of public use issues prior to adjudication of compensation issues. The practical desirability of such a procedure is obvious. An application of *Pullman*-type abstention would totally frustrate that policy. It would, in effect, require that state courts resolve all other issues, and then wait for a federal court to determine the public use question. This is exactly the type of interference with on-going proceedings that *Burford* and *Younger* abstention doctrines are designed to avoid. They are discussed below.

Burford abstention is inapplicable.

Burford abstention requires little discussion. The Ninth Circuit has found few situations in which that doctrine applies. *International Brotherhood of Electrical Workers v. Public Service Commission*, 614 F.2d 206 (9th Cir. 1980), is illustrative. That court noted (*Id.* at 211) that *Burford* "permits a court to decline to adjudicate an essentially local issue arising out of a complicated state regulatory scheme." But the court pointed out that the Ninth Circuit has refused to apply *Burford* if either of two factors exist. First, the court stated that *Burford* abstention is inappropriate if federal issues can easily be severed from any state law issues with respect to which state courts may have special competence. Second, application of *Burford* turns upon whether or not the state, in order to produce uniformity of decision, has given a single tribunal authority to hear all such suits.

Here, it is self-evident that remaining federal questions are easily separable from any state issues. No party has ever suggested otherwise. Furthermore, condemnation actions are

not confined by Chapter 516 to any particular court, although all actions filed to date have been in the First Circuit Court and it is likely all future actions will be heard there.

Younger-type abstention should not be applied.

The only abstention theory that arguably applies to this case is *Younger* abstention. That type of abstention, which rests upon concerns for comity and federalism, could be applied in this case by expansion of prior rulings. KCA submits that while such expansion is certainly possible on the facts of this case, it would be appropriate only if the alternative were to hold the statute unconstitutional. If the statute is upheld, there will be no conceivable further intrusion by federal courts upon state interests and hence no occasion for expansion of *Younger.*

In *Younger v. Harris*, 401 U.S. 37 (1971), the Court held that it was inappropriate for a federal court to entertain a Section 1983 action challenging a criminal statute during a criminal prosecution. The decision was based upon concerns for comity and federalism.

In the years following *Younger*, this abstention doctrine has been expanded significantly. First, the Supreme Court has held that in certain situations, *Younger* abstention principles apply to civil actions that implicate important state interests. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Court held that *Younger* principles applied to civil nuisance proceedings involving obscenity. The Court noted that case was "akin to a criminal prosecution". *Id.* at 604. Similar results were reached in *Juidice v. Vail*, 430 U.S. 327 (1977), and *Trainor v. Hernandez*, 431 U.S. 434 (1977). *Vail* involved the state's interest in its civil contempt process. The *Vail* Court said that federal court interference with the contempt process was likely to be as offensive to the state's interest as if a criminal proceeding were involved. 430 U.S. at 334. *Trainor* involved a civil action to recover fraudulently obtained welfare payments. The *Trainor* Court said that *Younger* and *Huffman* "are broad enough to apply to interference by a federal court with an on-going civil enforcement action such as this brought by the state in its

sovereign capacity". 431 U.S. at 444. Finally, in *Moore v. Sims*, 442 U.S. 415 (1979), the Court held that *Younger* principles applied where the state had brought an action for temporary custody of children believed to have been abused. The *Moore* Court said the *Younger* and *Huffman* concern—"that threat to our federal system posed by displacement of state courts by those of the National Goverment—is also applicable to civil proceedings in which important state interests are involved". *Id.* at 123. This broad language was possibly qualified by the Court's observation that the *Moore* case, like *Huffman*, was "in aid of and closely related to criminal statutes". *Id.*

In the Ninth Circuit, *Kinney v. Lenon*, 447 F.2d 596 (9th Cir. 1971) held that *Younger* non-intervention policies required abstention from claims involving the right to bail during state juvenile proceedings. Then, in *Williams v. Washington*, 554 F.2d 369 (9th Cir. 1977), the court held that the basic *Younger* principle required abstention where the state had initiated civil proceedings to rectify violations of its consumer protection act. In *Rosenthal v. Carr*, 614 F.2d 1219 (9th Cir. 1980), the court held that federal court intervention in bar disciplinary proceedings was precluded, stating that the *Younger*, *Huffman* and *Trainor* abstention doctrine "bars a federal court from enjoining pending state court criminal or civil enforcement proceedings absent exceptional circumstances." *Id.* at 1220.

Finally, in *Worldwide Church of God, Inc. v. California*, 623 F.2d 613 (9th Cir. 1980), the court held that absent exceptional circumstances, a district court should abstain in an action challenging a receivership established by a state court. In response to arguments that the receivership was not a "pending state proceeding" and did not implicate an "important state interest", the court stated that (1) imposition of the receivership was an integral element of on-going state litigation; (2) enjoining enforcement of a receivership order would violate the principles of federalism, equity and comity referred to in *Younger*; and (3) investigation and regulation of fraud by charitable trusts is a state interest of a magnitude similar to that involved in controlling welfare fraud, as in *Trainor*, or regulating child custody, as in *Moore*. 623 F.2d at 615-16.

These cases are difficult to categorize. Perhaps the best categorization that has been achieved is the following: "The Younger rules reach to any *civil enforcement action* brought by the state *in its sovereign capacity* . . . ." 17 Wright & Miller, *Federal Practice and Procedure* § 4254 at 547 (1978) (emphasis added). That description accurately reflects the fact that in each of the above cases, state action was initiated to redress violation of statutes or court rules closely akin to criminal laws.

The present case is somewhat different in that it does not involve any violation of state law. Nonetheless, in light of the sovereign state interest involved, it is certainly conceivable to expand Supreme Court and Ninth Circuit decisions to cover federal court challenges to on-going eminent domain litigation.

That was the result reached in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). There, the court read *Huffman* as authorizing *Younger* abstention where state civil litigation is pending, at least where the federal plaintiff would have a full opportunity to raise constitutional claims in the state litigation. The *Ahrensfeld* case appears to be unique. It certainly represents an extension from existing Ninth Circuit law interpreting *Younger* abstention principles.

The second basic modification of the original *Younger* doctrine involves the requirement that a state proceeding be pending when the federal case is begun. This requirement was modified in *Hicks v. Miranda*, 422 U.S. 332 (1975), in which it was held that *Younger* abstention was appropriate so long as pending state criminal prosecutions were commenced "before any proceedings of substance on the merits have taken place in the federal court". *Id.* at 349.

The present case obviously does not satisfy the pending proceedings requirement as it has been interpreted to date. At the time the federal action was commenced, HHA was moving steadily toward its first non-friendly condemnation suits, but filing of those actions was months away. Long before the first condemnation suit was filed against Bishop Estate, the court received voluminous memoranda on constitutional questions, supervised extended discovery, held a four-day preliminary

injunction hearing and issued a preliminary injunction decision and order containing findings on the probable constitutionality of the act. These were obviously "proceedings of substance".

To meet *Younger-Hicks* "pending proceeding" principles here, the court would have to rule that sufficiently advanced administrative proceedings, which are a statutory prerequisite to a suit by the state in its sovereign capacity, constitute the equivalent of pending state civil proceedings for purposes of *Younger*. While such a holding may be warranted in this case, it certainly represents an extension of present law. Such an extension is unnecessary.

The underlying rationale of *Younger* is that principles of comity, equity and federalism should preclude a federal court from interfering with ongoing proceedings in which the state is vitally interested. Whatever interference has already occurred has been mooted by legislative amendment of Chapter 516.

At this point, the only way further interference can arise is by reversal of Judge King. At present, state and federal courts are in agreement. Judge King's decision rests in significant part upon judicial notice of a basic fact repeatedly recognized by Hawaii courts—in Hawaii, land ownership is highly concentrated and a significant amount of privately owned residential land is held in leasehold. Prior to Judge King's decision, those facts were judicially noticed in *Sawada v. Endo*, 57 Hawaii 608, 616; 516 P.2d 1291, 1297 (1977); and were amplified considerably by Judge Lum's findings in *Midkiff v. Amemiya*, Civil No. 47103, First Circuit Court of the State of Hawaii.[1]

Following Judge King's decision, two judges of the Hawaii First Circuit Court have addressed public use issues in the context of actual condemnation actions. In each case, the court took judicial notice of the same facts noticed previously by the Hawaii Supreme Court and Judge King, and proceeded to hold that Chapter 516 is for a public purpose. In light of these

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1 These findings were admitted in evidence at the preliminary injunction hearing as Exhibit D-222 (See docket sheet entries for April 24, 1979 and RT at 154, 158.) The findings also appear in this record as an exhibit to CR 39.

decisions, it is apparent that conflict between state and federal systems will arise only in the event Judge King's decision is reversed.

KCA submits that ruling Chapter 516 unconstitutional would be literally unprecedented. One of the most striking aspects of this case is that in the hundreds of pages of briefing by plaintiffs, they have yet to cite a single federal decision holding that, notwithstanding state legislative or judicial determinations of public use, a state condemnation program violated public use requirements of the federal constitution. Since such a holding in this case would constitute the only such ruling in federal jurisprudence, this court might well regard extension of *Younger* abstention principles as preferable to striking down the statute. KCA submits, however, that extending *Younger* to justify abstention from an affirmance is unnecessary from the standpoint of comity, equity, or federalism, and would ill-serve either federal or state interests.

[DATED: October 28, 1981]

State Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. A. No. 80-4368

U.S. District Court
District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Defendants, Appellees.

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLEES

[Filed Nov. 3, 1981]

STATEMENT OF THE ISSUES

This supplemental brief is in response to this Court's request for a brief on the following issues:

1. Should the District Court have abstained from ruling on the constitutionality of Chapter 516, Hawaii Revised Statutes, and allowed a determination of that issue to be made by the State court.
2. If the abstention doctrine is not invoked, was there a substantial controversy for the Court to assume jurisdiction of the case.

DEFENDANTS-APPELLEES POSITION

Defendants-Appellees Paul A. Tom et al., the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority (collectively in this brief referred to as "HHA") submit as follows:

1. Under current case law, the *Younger* doctrine is not applicable to the instant case. HHA submits, however, that Chapter 516 should not be held to be unconstitutional by this Court without providing an opportunity for the State court to rule on the issue. The abstention doctrine can logically be extended and should be so extended in the instant case on the basis of equity, comity, and federalism.

2. There was a substantial controversy in the instant case for the court below to take jurisdiction. The controversy arose on a real threat on the part of HHA to implement Chapter 516, HRS, in its entirety with respect to certain specific parcels of land owned by the Trustees.

ARGUMENTS

A. *The Abstention Issue.*

In *Younger v. Harris*, 401 U.S. 37 (1971), the United States Supreme Court held that where a state criminal proceeding under a criminal statute, the constitutionality of which is disputed, is pending against a federal plaintiff at the time his federal complaint is filed, the principles of equity, comity, and federalism preclude the issuance of a federal injunction restraining enforcement of the criminal statute, unless bad-faith enforcement of the statute or other exceptional circumstances are demonstrated. The Court said that the state court in such a case should be allowed to complete its proceeding and have the opportunity to rule on the constitutional claims of the federal plaintiff. In *Samuels v. Mackell*, 401 U.S. 66 (1971) decided on the same day as *Younger*, the Supreme Court made the abstention doctrine applicable to declaratory rulings as well as to injunctive relief.

The *Younger-Samuels* doctrine has been applied in *Hicks v. Miranda*, 422 U.S. 332 (1975) to situations where a state proceeding is filed after the filing of a federal action but before any proceeding of substance on the merits has taken place in the federal court.

The *Younger* and *Samuels* cases involved criminal statutes and pending criminal proceedings in a state court. However, the abstention doctrine has since been extended to civil statutes and to civil proceedings pending in a state court. In the view of the Supreme Court, the abstention doctrine is applicable to state civil statutes and civil proceedings that are "in aid of and closely related to criminal statutes." It thus held that abstention was proper where a state court proceeding was pending under a disputed public nuisance statute, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), a disputed civil contempt law, *Juidice v. Vail*, 430 U.S. 327 (1977), a disputed statute which authorized civil proceedings to seek reimbursements from and to attach the property of recipients of public assistance payments for amounts fraudulently received by such recipients, *Trainor v. Hernandez*, 431 U.S. 434 (1977), and a disputed statute concerning child abuse and child custody, *Moore v. Sims*, 442 U.S. 415 (1979).

The abstention doctrine as enunciated in *Younger* and *Samuels* and in the subsequent cases do not in the first instance appear to apply to the instant case for two reasons. *First*, no state proceeding under the disputed statute involving the Trustees and HHA was pending at the time of the filing of the Trustees' action and no such state proceeding was commenced before proceedings of substance on the merit took place in the District Court below; and *second*, the statute involved does not appear to be the kind of statute deemed to be "in aid of and closely related to criminal statutes" as to justify the application of the abstention doctrine to the instant civil case.

With respect to the first of the two reasons enumerated above, the Trustees filed their action in the District Court on February 28, 1979 (R.1). The verified complaint alleged unconstitutionality of Chapter 516, Hawaii Revised Statutes. It attacked the validity of the taking by eminent domain autho-

rized by the statute. It claimed that the taking authorized by the statute is not for a public use, and it also attacked the validity of other specific provisions of the statute, including the provisions relating to mandatory arbitration and the method of calculating "just compensation."

A preliminary injunction hearing was held on April 24-27, 1979, and a preliminary injunction was issued on June 8, 1979 (R.125). The preliminary injunction enjoined HHA from effectuating the mandatory arbitration provision and the method of calculating just compensation set forth in the statute. In the injunction order, the Court also opined that the taking by eminent domain authorized by statute was for a public purpose.

Motions for partial summary judgment on the question of the constitutionality of the taking authorized by Chapter 516, that such taking is for a public use, were filed on September 18, 1979 (R.134) and on September 27, 1979 (R.136). A hearing on the merits of the motions for partial summary judgment was held on November 14, 1979, and the Court issued its Memorandum Decision on December 13, 1979 (R.150) and an Amended Memorandum Decision on December 19, 1979 (R.152), upholding the constitutionality of the taking.

Since the filing of this case by the Trustees in the District Court below, HHA has commenced condemnation actions against the Trustees in the State court. To date some 19 cases are pending in the Circuit Court of the First Circuit, State of Hawaii. Each of the cases involve different tracts of land. The first of these condemnation actions, however, was filed on January 30, 1980 (Civil No. 60465, Circuit Court of the First Circuit, State of Hawaii). Under the holdings of the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. Mackell*, 401 U.S. 66 (1971) and *Hicks v. Miranda*, 422 U.S. 332 (1975), it does not appear that the District Court below was precluded from proceeding to adjudicate the instant case. None of the condemnation actions filed by HHA was pending at the time of the filing of the Trustees' suit nor at the time of the District Court's decision upholding the constitutionality of Chapter 516.

With respect to the statute in question, Chapter 516 does not possess the characteristics of a criminal statute, and its provisions and the proceedings under the statute do not relate to any criminal statute. It is not the same kind of statute as the nuisance statute in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the contempt statute in *Juidice v. Vail*, 430 U.S. 327 (1977), the public assistance payment statute in *Trainor v. Hernandez*, 431 U.S. 434 (1977), or the child custody and child abuse statute in *Moore v. Sims*, 442 U.S. 415 (1979).

Based on the above, it does not appear that the *Younger-Samuels* principle is applicable in the instant case. Notwithstanding, HHA submits that this Court should not hold Chapter 516 to be unconstitutional unless and until the State court has had an opportunity to consider the constitutional issue. Of course, if the statute is upheld as constitutional by this Court, there would be no need for such deferral to the State court.

Allowing the State court to decide initially the constitutional issue would be appropriate notwithstanding the *Younger-Samuels* doctrine as it appears today. In *Trainor v. Hernandez*, *supra*, one of the chief considerations that persuaded the court to invoke the abstention doctrine, other than the relatedness of the public assistance payment statute to criminal statutes, was that the state proceeding sought to vindicate "important state policies." Chapter 516 embodies State policies of the gravest sort. Further, in the instant case, the question of public use involves consideration of State constitutional provisions concerning the exercise of the power of eminent domain. "Proper exercise of federal jurisdiction requires controversies involving unsettled questions of State law be decided in the State tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions." *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640 (1959), *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970). See also *Wisconsin v. Constantinean*, 400 U.S. 433 (1971); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In addition, on the principles of comity and federalism, the taking under Chapter 516 should not be held to be lacking in public purpose without affording the State court a chance to rule on the

question. This is particularly so when the State courts are presumed to know, far better than the federal courts, the conditions giving rise to the statute. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); *Clark v. Nash*, 198 U.S. 361 (1905); *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir. 1946).

B. *"Case or Controversy"*

At the time the Trustees filed their suit in the instant case, there was an actual controversy sufficient for the District Court to assert jurisdiction. As mentioned above, the Trustees' suit sought not only to enjoin the taking authorized by Chapter 516 and to receive a declaratory judgment that the taking is not for a public use, but also to enjoin the implementation and to secure a declaratory ruling that the statutory provisions on mandatory arbitration and on the method of calculating just compensation were not constitutional. The suit was filed at a time when HHA had ordered the Trustees into mandatory arbitration under Chapter 516 with respect to Block H of the tract of land owned by the Trustees in Waialae-Kahala, and HHA was in the process of ordering mandatory arbitration with respect to other lots owned by the Trustees. Preliminary Injunction Hearing, April 24-27, 1979 (RT at 219). Although the provisions on mandatory arbitration and method of calculating just compensation were declared invalid by the District Court (and HHA has not appealed from such holding), eminent domain action constituted the next step after mandatory arbitration under the procedure set forth in Chapter 516.

In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Supreme Court held that when prosecution is threatened, and the threat is real, there is an "actual controversy" for the court to take jurisdiction of a suit filed to enjoin such prosecution and to have the statute under which such prosecution is sought declared unconstitutional. In the instant case, under the circumstances outlined above, the threat of implementation of Chapter 516 in all respects as it existed at the time of the filing of the federal suit cannot be characterized as "imaginary" or

"speculative." Thus, there was an actual controversy permitting the District Court to assert jurisdiction over the case.

CONCLUSION

HHA respectfully submits that, although the *Younger-Samuels* doctrine of abstention, as it now stands, does not appear to require deference to State court proceedings in the instant case, this Court should not declare Chapter 516 to be unconstitutional without providing the State court an opportunity to rule on the issue. HHA further respectfully submits that an actual controversy existed at the time of the filing of the instant case in the District Court.

DATED: Honolulu, Hawaii, October 28, 1981

Intervenors' Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—vs.—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees.

INTERVENOR-APPELLEES, WAI-KAHALA TRACT "H" ASSOCIATION, INC., HALAWA HILLS LANDSALE COMMITTEE, AWAKEA ASSOCIATION, ALII SHORES COMMUNITY ASSOCIATION, ENCHANTED HILLS, UNIT I, KALAMA VALLEY COMMUNITY ASSOCIATION, MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC., KAMILOIKI COMMUNITY ASSOCIATION, LUNALILO MARINA COMMUNITY ASSOCIATION, MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE SPINNAKER ISLE ASSOCIATION, WAIALAE IKI COMMUNITY ASSOCIATION, AND WAIAU COMMUNITY ASSOCIATION

SUPPLEMENTAL BRIEF FOR INTERVENOR-APPELLEES

[Filed Nov. 3, 1981]

I. *Introduction*

By this appeal the Trustees of the Bernice P. Bishop Estate (hereinafter "Trustees") seek to overturn a Final Judgment and Permanent Injunction issued by the District Court of Hawaii. The case involves the facial constitutionality of the Hawaii Land Reform Act, Hawaii Revised Statutes c. 516. The District Court ruled that some sections of the Act were unconstitutional, but severable. It enjoined enforcement of those sections. The constitutional challenge to those sections is now moot since they were amended out of the Act. The District Court ruled that, except for the excised sections, the Hawaii Land Reform Act is constitutional. Summary judgment was granted against the Trustees.

On appeal the Trustees ask this Court to reverse the District Court and declare the Hawaii Land Reform Act unconstitutional on its face. The Trustees further argue that the District Court was wrong in granting summary judgment, and that the case should be remanded for a full trial on constitutionality.

Intervenor-appellees, representing numerous lessee associations, believe the Trustees' attempt to have this Court strike down the state law must fail. As outlined in our Brief For Intervenor-Appellees, the standard for review is whether the state Legislature was so arbitrary, capricious and unreasonable that the Court must step in and overrule the legislative enactments. The Legislature believed that a social problem existed in Hawaii because of a severe land shortage. The means chosen to rectify this problem include the eminent domain statute under attack here, as well as interrelated statutes creating rent control and establishing lessees' rights. No fewer than three judges, two state and one federal, declared the Act constitutional. It is impossible for the Trustees to meet the standard and prove that the Legislature was completely without support of its actions.

The Trustees' position in this Court is extremely questionable for another, compelling reason. Under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), federal courts should

abstain from deciding a case of this magnitude in which the State is deeply involved while parallel actions are pending in state court.

When this complaint in this case was filed no action had been brought in state court either for a declaratory judgment or for condemnation under the Hawaii Land Reform Act. The records of the First Circuit Court, State of Hawaii, indicate that there are now at least fifteen cases pending. In almost all these pending cases the various landlords, including the Trustees, raised as affirmative defenses the alleged constitutionality of the Act. The state courts are squarely faced with deciding whether the Hawaii Land Reform Act is constitutional. While this pending appeal raises that question in a vacuum, merely looking at the statute on its face, the state courts will decide the constitutional challenge in the context of an actual application of the law.

Intervenor-appellee believes that the District Court decision was correct at the time issued. Considering the activity in state court since then, the interest of the State in this issue, and the need to preserve the relationship of comity between the federal and state systems, this Court should abstain. The case should be dismissed so that the state court may freely decide all issues involved with the state statute.

II. *History of Action Related to the Statute*

The Trustees filed their verified complaint in the U.S. District Court for the District of Hawaii, CR 1, on February 28, 1979. They sought a declaratory judgment that the Hawaii Land Reform Act is unconstitutional and injunctions preventing application of the Act. When the Complaint was filed, no action had been filed in state court to condemn any leased fee interest under the Act; no party sought to have a state court interpret the Act or declare it unconstitutional through an action for declaratory judgment. The Trustees had earlier filed a complaint for declaratory judgment and for instructions in state court on a companion statute, Act 185 of the 1975 Session Laws of Hawaii, codified as Haw.Rev.Stat. § 519-2. In

that prior case, *Midkiff v. Amemiya*, Civil No. 47103, Haw. First Cir. (1978), Judge Lum prepared extensive findings of fact and conclusions of law, including reaffirming the Legislative findings and purposes, and thus the constitutionality, of the Hawaii Land Reform Act. *Amemiya*, Finding No. 2.

In the instant case the District Court held that the mandatory arbitration and valuation formulae provisions of the Act were unconstitutional; however, this did not affect the Act as a whole becaused those sections were severable. Decision on Motion For Preliminary Injunction, CR 123, 471 F.Supp. 871. No appeal was taken on that ruling. The issue became moot when those infirmities were amended out of the Act. 1980 Haw.Sess.Laws, Act 107.

The District Court considered the Trustees' continued challenge to the Hawaii Land Reform Act with those constitutionally infirm sections excised. On December 19, 1979 Judge King issued his amended memorandum decision, CR 152, 483 F.Supp. 62, in which he declared the Act constitutional. The District Court granted summary judgment holding that it would be impossible for the Trustees to disprove every conceivable rationale supporting the Act. CR 152 at 11-12, 483 F.Supp. at 69-70.

Since the filing of the complaint in the instant case several condemnation proceedings were instituted in state court under the Act. The landlords whose interests are being condemned raise a number of defenses to the actions in their answers, including, apparently universally, the affirmative defense that the Act is unconstitutional. A typical example is the answer to complaint filed by the Trustees on March 20, 1980 in *Hawaii Housing Authority v. Midkiff*, Civil No. 60465, Haw. First Cir. The Answer alleges twenty-one separate defenses, including:

> *Third Defense*
>
> Chapter 516, HRS, is unconstitutional and illegal under the provisions of the United States Constitution.
>
> . . . .

Fifth Defense

Chapter 516, HRS, is illegal and Plaintiff [the Hawaii Housing Authority] is barred from pursuing the action herein under the provisions of the United States Civil Rights Act, 42 United States Code § 1983.

Sixth Defense

The attempted condemnation and taking of the property interests of Trustees herein is unconstitutional and illegal since it is not for a public use and purpose.

Seventh Defense

The regulations promulgated and issued by Plaintiff herein, including Amended Rule 10, under which Plaintiff has purported to act, are unconstitutional and illegal under the provisions of the United States Constitution.

. . . .

Ninth Defense

The regulations promulgated and issued by Plaintiff herein, including Amended Rule 10, under which Plaintiff has purported to act, are illegal under the provisions of the United States Civil Rights Act, 42 United States Code, § 1983.

. . . .

Thirteenth Defense

The complaint herein is barred as to any and all residential houselots wherein the leases for said lots were executed prior to the effective date of Chapter 516, HRS.

The state court was asked to rule on a motion for summary judgment as to these affirmative defenses. On October 20, 1981 Judge Fong issued his order granting defendant lessees' motions for partial summary judgment and denying defendant trustees' motion for summary judgment, *Hawaii Housing Authority v. Midkiff, supra*. The Court held the Hawaii Land Reform Act "is constitutional under the Constitution of the United States and does not violate the Fifth and Fourteenth Amendments of the United States Constitution or impair the

obligations of contract under the Constitution of the United States." A complete copy of this decision is attached to this brief as exhibit A, and a certified copy of the order was previously mailed to this Court.

There are now over fifteen actions in eminent domain under the Act pending in the First Circuit Court, State of Hawaii. The constitutional issues continue to be raised although the state courts are granting summary judgments against the landlords. Many of these cases end in settlement, but there is no question that the Hawaii Supreme Court will have to rule on the question of the Act's constitutionality, under both Constitutions: Hawaii's and the United States'.

III. *Argument*

The United States Supreme Court issued a number of decisions which limit the power of a federal court to take action that might interfere with an ongoing state proceeding. Beginning with *Younger v. Harris*, 401 U.S. 37 (1971), the Court has directed lower federal courts to respect proceedings in the state system and refrain from issuing injunctions against state courts and state officials. Although *Younger* involved a pending criminal case, the doctrine of abstention has been greatly expanded by the Court to include civil cases such as the case at bar. For a good summary of Supreme Court cases see *L.H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981), fn. 1 & 2 at 1352-54.

The Ninth Circuit similarly expanded the reach of *Younger* abstention from criminal to state civil proceedings where the state has a particular interest. *Kinney v. Lenon*, 447 F.2d 596 (9th Cir. 1971). In *Kinney* the issue was a class action challenging a state statute denying bail to juveniles. The appellate court has ordered federal abstention in a number of non-criminal cases: *Phillips v. Osborne*, 444 F.2d 778 (9th Cir. 1971) (federal district court erred in enjoining state court litigation for breach of fiduciary duty); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973) (federal court should abstain and allow state court to decide issue of indigent father's right to court appointed counsel in child support case); *Williams v. State of Washing-*

ton, 554 F.2d 369 (9th Cir. 1977) (federal court should abstain from enjoining state proceedings because of state's interest in enforcing its Consumer Protection Act); *Worldwide Church of God, Inc. v. State of California*, 623 F.2d 613 (9th Cir. 1980) (federal court was correct in not enjoining state court from imposing a receivership on a church); *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981) (federal court should not enjoin state disciplinary proceedings against an attorney).

The Hawaii Land Reform Act is a vital part of an intricate structure fashioned over a twenty-five year period by the state legislative, judicial and executive branches. The State's interest in solving the social and economic problems created by the leasehold system and the shortage of land in the islands is illustrated by the extensive legislative findings of the remedial statutes. 1957 Haw.Sess.Laws, Act 13; 1975 Haw.Sess.Laws, Act 185; 1975 Haw.Sess.Laws, Act 184; 1975 Haw.Sess.Laws, Act 186. In the case at bar the State itself, through its agency, the Hawaii Housing Authority, is the named defendant in the suit brought by the Trustees to enjoin action taken pursuant to the Hawaii Land Reform Act. The Hawaii Housing Authority, and thus the State, is similarly required by statute to be the plaintiff in every eminent domain action brought under the Act. Haw.Rev.Stat. §§ 516-23 and 101-15. Clearly the State has "a particular interest" in the state civil proceedings. *Kinney v. Lenon, supra*.

The reasons for federal abstention are quite clear, whether called "comity" or "federalism." As the Ninth Circuit stated in *L.H. v. Jamieson, supra*, "Halting a pending state proceeding and amputating a federal defense constitutes an affront to the competency of state courts and seriously disrupts the coherency of state efforts to enforce its laws . . ." 643 F.2d at 1354.

The standards for abstention under *Younger* are also clear and were explained in *L.H. v. Jamieson, supra*,

> *Younger* and is progeny share two principal characteristics: (1) the plaintiffs sought to enjoin the continuation of a state proceeding or sought to enjoin state officials from

> enforcing a state statute, and (2) the basis for federal relief could have been raised as a complete or partial defense to a pending or ongoing state enforcement action during the normal course of the state proceeding. When these two characteristics are present, the argument for employing equitable restraint is compelling.
>
> 643 F.2d at 1352
> (footnotes omitted)

In the case at bar the Trustees explicitly sought to enjoin state officials from enforcing a state statute: they asked the District Court to "issue a permanent injunction against the defendants [the Hawaii Housing Authority], enjoining them from taking any action whatsoever under the purported authority of H.R.S. Chapter 516 with respect to the Trustees or the Trustees' leased residential lots." Complaint, CR 1, at 13.

There is no dispute that "the basis for federal relief", i.e. the challenge to the Act's constitutionality, could be raised as a defense in pending state proceedings. There are now state court proceedings in which the Trustees raised the Act's constitutionality as a defense. They were defeated in that regard not because the state courts refuse to hear the issue of federal constitutionality, but because the Act is clearly constitutional.

There are exceptions to *Younger* abstention, but they do not apply in this case. The federal courts should not abstain if there are extraordinary circumstances, defined as bad faith or blatent unconstitutionality. *Williams v. State of Washington, supra*. There is no allegation that any state action was brought in bad faith. The hearings by the Hawaii Housing Authority and the commencement of eminent domain proceedings were required by statute. Haw.Rev.Stat. §§ 516-22 and 516-23. Although the Hawaii Land Reform Act has been challenged for constitutionality, even the Trustees could not claim that it is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Watson v. Buck*, 313 U.S. 387, 402. Quoted in *Williams v. State of Washington, supra*, at 370.

Three judges independently decided that the Act is constitutional. If a federal court should intervene only when a state statute is clearly unconstitutional "in every clause, sentence and paragraph" then the opposite should also hold true: A federal court should abstain when a statute is clearly constitutional and has been declared so by competent state and federal judges.

The Fifth Circuit considered a similar situation only four months ago. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981), involved constitutional challenges to a Texas obscenity statutes. As in the case at bar the statute in question was declared to be constitutional by the District Court. Similarly, there were no state cases pending at the time the federal suits for declaratory judgment and injunctions were filed. The Appellate Court ruled that the District Court was correct in not applying *Younger* abstention at the time because of the lack of ongoing state court proceedings. However, a number of state court actions were started after the District Court's first decision, a change in the situation which "adds a factor of significant weight to the absention calculus . . ." 648 F.2d at 1033. The Court ruled that "intervening circumstances have rendered abstention by this Court appropriate," *id.*, not solely because of *Younger.* "Rather, our abstention is an exercise of the discretion we enjoy as an equity court confronting a suit seeking a suit seeking equitable relief from the challenged statute." *Id. Red Bluff Drive-In* is procedurally different from the instant case because *Red Bluff* also involved a question of *Pullman* abstention. (*Railroad Comm. of Texas v. Pullman*, 312 U.S. 496 (1941) instructs the federal courts to abstain until the state court can construe a state statute to define its terms and limitations. However, the terms and limitations of the Hawaii Land Reform Act are explicitly stated in the statute. *Eg.* Haw.Rev.Stat. §§ 516-1, 516-2, 516-21, 516-22.) Under the *Pullman* doctrine retention of jurisdiction by the federal courts is appropriate if there is a danger that the state courts will not resolve the federal constitutional questions. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d at 1025. Under the *Younger* doctrine or where the state courts can resolve all issues arising out of a

statute of primary importance to the people of that state the federal court should abstain and dismiss the federal complaint. The United States Supreme Court ordered such a dismissal in a case involving a constitutional challenge in federal court to another Hawaii statute.

> We are of the view, however, that the United States District Court for Hawaii, as a matter of its discretion, should have refused to grant this injunction. The complaint called for broad consideration of the application of the Act to foreign language schools and teachers. It had not been construed by the Hawaiian courts. . . . Enforcement is in equity in the circuit courts of the Territory. Plaintiffs have no reason to fear a court of equity, and there is every reason to believe that their constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, eventually could be had to the United States Supreme Court . . . Entirely aside from the question of the propriety of an injunction in any court, territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case.
>
> . . . .
>
> The judgment is reversed and the cause remanded to the District Court with directions to dismiss the complaint.
>
> *Stainback v. Mo Hock Ke Lok Po*,
> 336 U.S. 368, 383 (1949)
> (footnotes deleted)

In the case at bar the Hawaii Supreme Court is competent to decide all challenges raised by the Trustees to the Hawaii Land Reform Act. If the Trustees believe that there are still federal constitution questions remaining after the State Supreme Court has issued its decision they may appeal directly to the United States Supreme Court. No party will be prejudiced by this Court's abstaining to allow the state courts to first decide an issue of such great importance to the people of the state.

IV. *Conclusion*

Intervenor-appellees respectfully submit that this Court abstain and order this case remanded and the complaint dismissed.

DATED: Honolulu, Hawaii, October 28, 1981.

EXHIBIT A

[to Intervenors' Supplemental Brief]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 60465
(KSE)

HAWAII HOUSING AUTHORITY, a public body and a body corporate and politic,

Plaintiff,

—v.—

FRANK E. MIDKIFF, et al.,

Defendants.

ORDER GRANTING DEFENDANT LESSEES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT TRUSTEES' MOTION FOR SUMMARY JUDGMENT

The Defendant Lessees' Motions for Partial Summary Judgment and the Defendant Trustees' Motion for Summary Judgment having come on for hearing on Thursday, May 28, 1981, at 8:30 a.m., before the Honorable Arthur S. K. Fong, Judge of the above-entitled court, the Plaintiff Hawaii Housing Authority being represented by James J. Stone, Yukio Naito and Lester G. L. Wong, the Defendant Lessees being represented by A. Bernard Bays and Dan T. Kochi, the Lessee Sarah L. Thompson represented by Mark Uyeno, and the Defendant Trustees being represented by Albert I. Moon and Paul S. Aoki, and the Court having considered the memoranda and arguments of counsel herein, and

WHEREAS, the Court takes judicial notice of the decisions and findings in *Midkiff v. Amemiya,* Civil No. 47103, First Circuit Court of the State of Hawaii, and *Midkiff v. Tom,* Civil No. 79-0096, United States District Court for the District of Hawaii; and

WHEREAS, the Court further takes judicial notice of the concentration of land ownership by a few in the State of Hawaii and the significant amount of land held in residential leaseholds, facts which the Hawaii Supreme Court has judicially noticed in *Sawada v. Endo,* 57 Hawaii 608 (1977); and

WHEREAS, the Court finds as follows:

1. There are no disputes of material facts herein;

2. Chapter 516, Hawaii Revised Statutes, was properly enacted and the Legislature had a rational basis for it; and

3. Chapter 516 is for a public purpose—to distribute fee simple ownership of residential land to as many people as possible for the economic and social welfare of the public—

and the condemnation of the properties herein is for a public purpose pursuant to Chapter 516; and

WHEREAS, the Court further finds:

1. The taking under Chapter 516 is constitutional under the Constitution of the United States and does not violate the fifth and fourteenth amendments of the United States Constitution or impair the obligations of contract under the Constitution of the United States;

2. The taking under Chapter 516 is constitutional under the constitution of the State of Hawaii and does not violate the due process clause or the equal protection clause or impair the obligations of contract under the constitution of the State of Hawaii;

3. Chapter 516 does not violate the provisions of the United States Civil Rights Act, 42 U.S.C. Section 1983; and

4. Chapter 516 is applicable to residential leases executed prior to the enactment of the statute;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Defendant Lessees' Motion for Partial Summary Judgment and Supplemental Motion for Partial Summary Judgment regarding the issues mentioned above are hereby granted, and the remaining issues including issues 2, 4, 5, 6, and 7 of the Defendant Lessees' Supplemental Motion for Partial Summary Judgment are denied and reserved for trial herein; and

2. Defendant Trustees' Motion for Partial Summary Judgment is hereby denied.

DATED: Honolulu, Hawaii, Oct. 15, 1981

Intervenors' Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Frank E. Midkiff, et al., v. Paul A. Tom, et al.

C.A. No. 80-4368

[Filed Oct. 30, 1981]

At oral argument heard by Judges Alarcon, Ferguson and Poole on October 21, 1981 in Honolulu, Hawaii with regard to the above-captioned case, all parties were directed to submit supplemental letter briefs on the subject of federal abstention from the case pending the conclusion of state proceedings. On behalf of Intervenor-Appellees Portlock Community Association, Kokohead Community Lease-Fee, Inc., West Marina Community Association and Hahaione Valley Community Association, Inc., we submit the argument below in favor of abstention.

One additional point should be brought to the Court's attention. At oral argument, Judge Poole directed some questions to me regarding the tax implications to the Appellants in this action flowing from the sale of their leased fee interests pursuant to the Land Reform Act. Although the Act of course cannot authoritatively resolve federal tax questions, the Hawaii Legislature has declared its intent in Section 516-27 of the Act that any conveyance of title to property by a fee owner to the Hawaii Housing Authority under Part II of the Act shall constitute a compulsory or involuntary conversion for state and federal tax purposes.

Our arguments in favor of absention by the Court are as follows:

1. THIS COURT SHOULD ABSTAIN FROM DETERMINING THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED BY THIS APPEAL

The rationale supporting Intervenor-Appellees' arguments in favor of abstention by this Court is twofold: First, a federal court considering the facial constitutionality of the Hawaii

Land Reform Act should have the benefit of findings of fact and conclusions of law by the State Supreme Court regarding relevant state and federal constitutional issues. A copy of Judge Lum's Findings of Fact and Conclusions of Law with respect to the Rent Renegotiation Act made in the case of *Midkiff v. Amemiya*, Civil No. 47103, (1st Cir. Ct. Haw. June 29, 1978) is attached hereto as Exhibit "A". Intervenor-Appellees submit that this Court should allow the state courts the opportunity to consider the constitutionality of the Land Reform Act and to make similar findings and conclusions prior to the submission of an action such as the present one to the federal courts. Secondly, since the issue of the constitutionality of the Land Reform Act "as applied" may be raised and litigated in the state condemnation proceedings, this Court should abstain from determining the facial constitutionality in the present action, thus allowing the simultaneous presentation of all constitutional issues to each court which is called upon to consider this important legislation.

A. The Land Reform Act is part of a comprehensive State constitutional and statutory scheme, the implementation of which should initially be left to the State.

Abstention is appropriate under circumstances such as those now before this Court for several reasons. The Hawaii Land Reform Act is part of a comprehensive constitutional and statutory scheme designed to deal with the shortage of fee simple land available within the State for residential purposes, and with the attendant social and economic consequences thereof to Hawaii's citizens. The preamble to the State Constitution begins with the words:

> We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."[1]

---

1 "The life of the land is preserved in righteousness."

We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

Several sections of the State Constitution refer to the quality of life to which Hawaii citizens are entitled.[2] There are no less than fourteen separate sections referring to housing, lands or real property, some of which are also concerned with social quality.[3] The framers alluded to the need, unique to the State of Hawaii, for state action to alleviate the problems associated with the shortage of useable land in the following sections of the constitution:

ARTICLE I

BILL OF RIGHTS

. . . Rights of Individuals

Section 2. All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, *and the acquiring and possessing of property.* . . . (emphasis added)

ARTICLE IX

PUBLIC HEALTH AND WELFARE

. . . Housing, Slum Clearance, Development and Rehabilitation

---

2 The following sections of the Hawaii State Constitution make specific reference to the quality of life of Hawaii citizens:

Preamble;
Article I, Section 2;
Article IX;
Article XI.

3 Sections of the State Constitution referring to lands or real property are:

Article I, Sections 2 & 20;
Article XI, Sections 1-4 and 10;
Article XII, Section 1;
Article XVI, Sections 6-10 and 12.

Section 5. The State shall have the power to provide for, or assist in, housing . . . The exercise of such power is deemed to be for a public use and purpose.

ARTICLE XI

CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES

Farm and Home Ownership

Section 10. The public lands shall be used for the development of land and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.

To effectuate the constitutional mandate, the Hawaii Legislature enacted the Rent Renegotiation Act (Chapter 519 of the Hawaii Revised Statutes) and the Land Reform Act (Chapter 516 of the Hawaii Revised Statutes). The Rent Renegotiation Act provides certain limitations on the lessor's ability to renegotiate lease-rents where a residential houselot is subject to a long term lease. It affects the same interests in residential leaseholds which are addressed under the Land Reform Act. Both acts share the same legislative history, and both are supported by the same legislative findings. The history of these Acts is illustrated in the Record of this case, and a detailed discussion of same will not be undertaken in this brief. The Court is respectfully referred to the Record and the briefs of counsel filed herein.

If this Court were to strike down the Land Reform Act as violative of the Federal Constitution, the state constitutional and statutory scheme would be severely disrupted. State functions of great social and historical importance would be impaired, and a conflict between state and federal sovereignties would be created. Such a result is unnecessary and should be avoided in this litigation, particularly since there are condemnation proceedings brought by the Hawaii Housing Authority pursuant to the Land Reform Act presently pending in the state court.

It is a well settled principle of law that the presence of circumstances unique to a particular geographic area may support a finding of public use in the context of eminent domain proceedings where such a finding could not be made in another location where such unique conditions do not exist. *Clark v. Nash*, 198 U.S. 361 (1905); *Strickley v. Highland Boy G.M. Co.*, 200 U.S. 527 (1906).

A federal court would be considerably aided in making an informed determination as to whether the Land Reform Act authorizes the use of the power of eminent domain for a proper public use or purpose by the opportunity to refer to a state court determination of this issue under state law.

B. Abstention is appropriate where a state statute authorizing the use of eminent domain is made the subject of a federal constitutional challenge while state condemnation proceedings are pending.

Appellants have raised and will have the opportunity to litigate their constitutional claims in the state condemnation proceedings. Thus the presence of federal constitutional claims in the federal action does not preclude this Court's staying its hand. *Ahrensfeld v. Stephens*, 528 F. 2d 193 (7th Cir. 1975). In the *Ahrensfeld* case, an ordinance authorizing the use of the eminent domain power by an Illinois village was challenged in federal court on federal constitutional grounds. The federal court abstained from determining the constitutional issue, dismissing the action before it. In a well-reasoned opinion considering the occasion for absention by a federal court under circumstances closely resembling those now before this Court, the Seventh Circuit Court of Appeals affirmed the dismissal. Citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), the court noted the "sensitive nature" of federal court intervention in a state's eminent domain system, and further noted the *Thibodaux* court's remark that eminent domain is "intimately involved with state prerogative." The opinion also pointed out that several federal courts have held that state eminent domain proceedings should not be interfered

with by federal courts becuase their local nature makes interference unwise. Also cited with approval was *Creel v. City of Atlanta*, 399 F. 2d 777 (5th Cir. 1968), wherein that court stated in reference to a federal constitutional challenge proceeding simultaneously with a state court condemnation action:

> The principal and essential issue is one properly for determination by the state courts. Not only is municipal eminent domain ordinarily a local matter, but it is difficult to imagine a situation where more confusion would arise than would be the case if the parties here were allowed to simultaneously pursue both this action and the state condemnation proceeding. *Creel v. City of Atlanta*, supra at 779.

The *Ahrensfeld* court reasoned that, since the plaintiffs were able to raise the crux of their federal constitutional claims in the pending state action, federal court intervention was unnecessary. If the state supreme court should deny the plaintiffs any federal constitutional rights, they would then have the opportunity to bring the matter before the U.S. Supreme Court for reexamination and review. In light of these considerations, the court abstained. In doing so, it held that where a federal district court abstains in deference to pending state proceedings so as not to interfere with state sovereignty (i.e. in exercising *Burford*-type abstention), the proper disposition of the matter is dismissal. See also *Younger v. Harris*, 401 U.S. 37 (1971); *Crawford v. Courtney*, 451 F. 2d 489 (4th Cir. 1971); *Hamar Theatres, Inc. v. Cryan*, 393 F. Supp. 34 (D.N.J. 1975) (three-judge court); Wright, Law of Federal Courts, supra at 200.

C. Judicial policy disfavors a multiplicity of lawsuits arising out of the same set of facts.

It is well settled that strong judicial policy disfavors a multiplicity of lawsuits arising out of a single nucleus of operative facts. *Rosado v. Wyman*, 397 U.S. 397 (1970); *Southern Construction Co. v. U.S.*; 371 U.S. 57 (1962); *Moor v. Texas & N.O.R. Co.*, 75 F. 2d 386 (5th Cir. 19735);

Crompton-Richmond Co., Inc. v. U.S., 273 F. Supp. 219 (S.D.N.Y. 1967). Although Appellants have bifurcated their constitutional challenge to the Land Reform Act, alleging facial unconstitutionality under the Federal Constitution in the federal courts and raising state constitutional issues only in state court, in reality they seek to litigate the same issues simultaneously in two different forums. As the state condemnation actions proceed to judgment the Trustees can be expected to raise the issues on appeal to the Hawaii Supreme Court of facial constitutionality as well as constitutionality "as applied". Should the Trustees suffer an adverse ruling at the hands of that Court, they will be before the U.S. Supreme Court by right of appeal under 28 U.S.C. Section 1257(2). If this Court should now rule that absention is improper, the present litigation will also be before the U.S. Supreme Court, either by right of appeal by the Appellees pursuant to 28 U.S.C. Section 1254 (2), or by petition for certiorari by the Appellants pursuant to 28 U.S.C. Section 1254(1). Thus the federal constitutional issues will be brought before the U.S. Supreme Court in fragmented fashion on two separate appeals.

If, on the other hand, this Court chooses to abstain, dismissing the present action, all federal and state constitutional issues, whether of facial constitutionality or constitutionality "as applied", will be presented for determination in orderly procedural fashion, first in the state judicial system and then at the federal level. In this manner, the complete constitutional picture will be presented to each court which is called upon to rule on this important legislation, including any additional issues which might arise out of the implementation of the Act by the State.

D. Conclusion.

For the foregoing reasons, Intervenor-Appellees respectfully request that this Court enter an Order directing that this action be dismissed.

[DATED: October 28, 1981]

[Exhibits omitted in printing]

State Court Rulings in *Midkiff v. Amemiya*

IN THE
SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1978

No. 7294

Civil No. 47103

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop,

Plaintiffs-Appellants,

—vs.—

RONALD Y. AMEMIYA, Attorney General of the State of Hawaii, et al.,

Defendants-Appellees.

JUDGMENT ON APPEAL

Pursuant to the Order Granting Motion for Partial Dismissal of Appeal filed by the Supreme Court of the State of Hawaii on April 14, 1982, and the Memorandum Opinion of the Supreme Court of Hawaii filed on May 5, 1982:

1. The appeal is dismissed as moot and the Judgment of the First Circuit is vacated as to paragraphs 1, 2 and 3 thereof, and the case is remanded with directions to dismiss the complaint as moot; and

2. Paragraph 4 of the Judgment of the First Circuit Court is affirmed as to the award of costs in the amount of $6,644.21 and reversed as to the award of attorneys' fees in the amount of $130,000.00.

DATED: Honolulu, Hawaii, MAY 18 1982.

IN THE
SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1978

No. 7294

Civil No. 47103

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop,

Plaintiffs-Appellants,

—VS.—

RONALD Y. AMEMIYA, Attorney General of the State of Hawaii, et al.,

Defendants-Appellees.

NOTICE OF JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT COURT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following Judgment on Appeal:

Pursuant to the Order Granting Motion for Partial Dismissal of Appeal filed by the Supreme Court of the State of Hawaii on April 14, 1982, and the Memorandum Opinion of the Supreme Court of Hawaii filed on May 5, 1982:

1. The appeal is dismissed as moot and the Judgment of the First Circuit is vacated as to paragraphs 1, 2 and 3 thereof, and the case is remanded with directions to dismiss the complaint as moot; and

2. Paragraph 4 of the Judgment of the First Circuit Court is affirmed as to the award of costs in the amount of $6,644.21 and reversed as to the award of attorneys' fees in the amount of $130,000.00

DATED: Honolulu, Hawaii, MAY 18 1982.

IN THE
CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 47103

FRANK E. MIDKIFF, RICHARD LYAMN, JR., HUNG WO CHING, MATSUO TAKABUKI, and MYRON B. THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop,

Plaintiffs,

—vs.—

RONALD Y. AMEMIYA, Attorney General of the State of Hawaii, et al.,

Defendants.

ORDER DISMISSING PLAINTIFFS' COMPLAINT AS MOOT

Pursuant to the Judgment on Appeal filed by the Supreme Court of the State of Hawaii on May 18, 1982,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint for Declaratory Judgment and for Instructions, filed in the above-entitled action by Plaintiffs on December 29, 1975, and the First Amended Complaint for Declaratory Judgment and for Instructions, filed by Plaintiffs in the above-entitled action on February 27, 1976, be and hereby are dismissed as moot.

DATED: Honolulu, Hawaii, JUNE 2 1982.

Excerpt from reporter's transcript, April 24, 1979, pages 59-61

* * *

KAZUO KOHATSU was called as a witness by the plaintiff, was sworn, and testified as follows:

THE CLERK: Please state your name and address and spell your last name.

THE WITNESS: Kazuo Kohatsu, my last name is spelled K-O-H-A-T-S-U, Honolulu, Hawaii.

Direct Examination By Mr. Ashford:

Q What is you residence, Mr. Kohatsu?

A 1449 Aina Koa.

Q Mr. Kohatsu, what is your position at the Hawaii Housing Authority?

A I'm the Land Reform Administration with Hawaii Housing.

Q Have you held that position since December of 1969?

A Yes.

Q Do you have administrative supervision of all the HHA activity under Chapter 516, Hawaii Revised Statutes?

A Yes. I'm the administrator for the Land Reform Act.

Q Formerly you . . . . Strike that. To whom do you report?

A To the Executive Board.

Q That's Mr. Franklin Sunn?

A Yes.

Q Who is Mr. Sunn's predecessor in office?

A Mr. Yoshio Yanagawa.

Q And he was Executive Director?

A That's correct.

Q Commencing when?

THE COURT: If you remember.

A Quite a few years prior to my employment, sir.

Q And when did Mr. Sunn succeed Mr. Yanagawa, as near as you can remember?

A It has been a couple of years.

Q Wasn't it in fact somewhere around September or October of 1976?

A I think so.

Q Now, Mr. Kohatsu, I take it that you are thoroughly familiar with the mechanics and procedures under Chapter 516, are you not?

THE COURT: That's your job, right?

THE WITNESS: That's my job.

Q Would you describe briefly for the Court the sequence and the timing of the steps that must be taken under Chapter 516 for the holder of a single family residential lease to by his lessor's fee simple title with the assistance of the HHA?

MR. O'CONNOR: I object, your Honor. That was what we were not going to go into.

THE COURT: I thought it . . . . You mean it's not in the statute?

MR. ASHFORD: Your Honor, the purpose of the question is to show that the HHA is administering the statute exactly as it is written and there is no deviation from that. There are a couple of options which the HHA can take at certain steps in this procedure and to show which options they have elected.

THE COURT: Why don't you just zero in on the options instead of leaving it wide open like that, and we'll see if there is any objection to that.

MR. ASHFORD: Fine.

MR. O'CONNOR: I would object to his going into the options. I thought we were going to talk about the law on its face and whether or not the law is constitutional on its face and then we get into the operation of the HHA and the options available and then we get into the practical thing which will come, as I understand, in the next hearing.

* * *

Excerpt from reporter's transcript, April 26, 1979, pages 217-219

KAZUO KOHATSU resumed the witness stand.

* * *

Direct Examination (contd) By Mr. Ashford:

Q Mr. Kohatsu, the HHA Under statute Chapter 516 has initiated and brought to conclusion a number of condemnation actions, has it not?

A Yes, it has.

Q And in all of those condemnation actions to date, is it correct that agreement on the price was first reached by the lessors and lessees?

A That is correct.

Q And is it correct that the lessees themselves provided the funds to pay for the leased fee acquisitions?

A Yes, they did.

Q No public funds have been used to acquire any of those lots?

A That is correct.

Q No lots have been condemned and held by the HHA?

A That is correct.

Q All of the lots condemned have been immediately transferred to the lessees who provided the funds for acquisition?

A Yes.

Q And, in that process, the HHA has not taken any profit or other return on this transaction, has it?

A We are not allowed to do so by the Act, sir.

Q Now, in the 12 years that the statute has been in effect, has the HHA ever refused to hold a public hearing upon applications received?

A Not to my knowledge, sir.

Q Or to find that an acquisition would effect the public purposes of the statute?

A Not to my knowledge.

Q Or to direct negotiations between the lessors and the lessees when requested so to do by the lessees?

THE COURT: Say that again?

Q Has the HHA ever refused to direct lessors to enter into negotiations with the lessees when the lessees have asked the HHA to make that request?

A No; as long as the requirements have been fulfilled.

Q Has HHA ever refused when requested by the lessees to extend the time to complete negotiations that have been commenced?

A We have asked for the agreement between the lessor and lessees as to any extensions.

Q And that has been obtained, has it not?

A That is correct.

Q Has HHA ever refused to declare an impasse in negotiations when requested to declare an impasse by the lessees?

A The only case to date is the Waialae-Kahala H Tract where an impasse was considered at all.

Q And in that case to date the lessees requested an impasse be declared and it was declared, was it not?

A That is correct.

Q And in that case the lessees requested the HHA to order mandatory arbitration and it did so, did it not?

A Yes. the HHA did.

Q That has been the only procedure which, or the only application, group of applications, if you will, with respect to a development tract which has yet proceeded to that stage of ordering mandatory arbitration.

A That is correct.

Q There are others following along very closely behind, are there not?

A Yes.

* * *

State Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenors-Appellees.

NOTICE OF APPEAL
[Filed July 15, 1983]

The State of Hawaii and the Hawaii Housing Authority and Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority, Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority, Defendants-Appellees in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), hereby appeal from the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case dated March 28, 1983, under 28 U.S.C. § 1254 (2). Rehearing and rehearing *en banc* were denied in this case on June 17, 1983.

Dated: Honolulu, Hawaii, July 14, 1983.

Intervenors' Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

U.S. District Court for the District of Hawaii

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellant,

—vs.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenors-Appellees.

Appeal from Final Judgment

Notice of Appeal to the Supreme Court
of the United States
[Filed July 15, 1983]

Notice is hereby given that Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc., Intervenors-Appellees above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on March 28, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 14, 1983.

Intervenors' Notice of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

USDC Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Appellees.

Notice of Appeal to the Supreme Court
of the United States
[Filed July 19, 1983]

Notice is hereby given that the Kahala Community Assn., Inc., et al., Intervenors-Appellees in this case, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Ninth Circuit entered March 28, 1983, rehearing denied by order dated June 17, 1983, reversing the Judgment of the United States District Court for the District of Hawaii entered June 10, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 18, 1983.